United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

74-1584

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket Nos. 74-1584
74-1636

SCIENTIFIC HOLDING COMPANY, LTD.,

Plaintiff-Appellant,

- against -

PLESSEY INCORPORATED,

Defendant-Appellee.

ANSWERING BRIEF OF DEFENDANT-APPELLEE

ROGERS & WELLS
Attorneys for Defendant-
Appellee Plessey Incorporated
200 Park Avenue
New York, New York 10017
(212) 972-7000

Of Counsel:

William F. Koegel
James J. Maloney
John B. Koegel

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii-ix
ISSUES PRESENTED	1
COUNTERSTATEMENT OF FACTS	2
ARGUMENT	
I. JUDGE BONSAL'S DETERMINATION THAT THE MARCH 2 AMENDMENT WAS VALID AS A MATTER OF LAW SHOULD BE AFFIRMED	17
A. Alleged Lack of Consideration Was Not Available as a Defense . . .	17
B. Kovar Was Authorized to Agree to the Closing Amendments	29
C. Alternatively, the ISL Board Ratified and is Estopped from Challenging Kovar's Actions at Closing	33
D. Plaintiff's Claim of Coercion Was Legally Insufficient	40
E. Judge Bonsal's Decision Did Not Prejudice the Jury's Deliberations	48
II. THE JURY PROPERLY CONCLUDED THAT PLESSEY HAD THE RIGHT TO ASSUME MANAGEMENT CONTROL OF THE BUSINESS	51
III. PLESSEY CONTINUED THE BUSINESS OF ISL IN GOOD FAITH DURING THE MEASURING YEAR	64

Page

IV. PLAINTIFF OFFERED NO EVIDENCE TO SUPPORT ITS CLAIM THAT PLESSEY DEFRAUDED ISL 71

V. THE JURY'S VERDICT ON PLESSEY'S COUNTERCLAIM SHOULD BE REVERSED AND JUDGMENT ENTERED FOR PLESSEY 77

A. ISL Misrepresented Its Liabilities 77

B. ISL Overvalued Its Inventory 78

VI. PLESSEY WAS ENTITLED TO COSTS AS THE PREVAILING PARTY AND IN THE TAXING OF THESE COSTS SHOULD NOT HAVE BEEN BOUND BY THE "100-MILE WITNESS RULE" 81

A. Plessey Was the Prevailing Party 81

B. The "100-Mile Rule" Does Not Apply in This Circuit 83

CONCLUSION 86

TABLE OF AUTHORITIES

CASES:	Page
Albert v. Martin Custom Made Tires Corp., 116 F.2d 962 (2d Cir. 1941)	20
Amies v. Wesnofske, 255 N.Y. 156, 174 N.E. 436 (1931)	20
Anderson v. Wood Dolson Co., 212 App. Div. 483, 209 N.Y.S. 183 (1st Dep't 1925)	34, 40
Axelrath v. Spencer Kellogg & Sons, Inc., 33 N.Y.S.2d 94, aff'd, 265 App. Div. 874, 38 N.Y.S.2d 39 (2d Dep't 1942), aff'd, 290 N.Y. 767, 50 N.E.2d 103, cert. denied, 320 U.S. 761 (1943)	20
B.B. Chemical Co. v. Cataract Chemical Co., 2 F.R.D. 159 (W.D.N.Y.), modified on other grounds, 122 F.2d 526 (2d Cir. 1941)	82
Bachorik v. Allied Control Co., 34 A.D.2d 940, 312 N.Y.S.2d 272 (1st Dep't 1970)	41
Bank of America v. Loew's International Corp., 163 F. Supp. 924 (S.D.N.Y. 1958)	84
Berg v. Wall Street Traders, Inc., 46 F.R.D. 47 (S.D.N.Y. 1968)	82
Bloomquist v. Farson, 222 N.Y. 375, 118 N.E. 855 (1918)	20
Bond & Goodwin, Inc. v. DuPont, 254 App. Div. 543, 5 N.Y.S.2d 423 (1st Dep't 1938), aff'd, 280 N.Y. 715, 21 N.E.2d 211 (1939)	20
Bowman v. West Disinfecting Co., 25 F.R.D. 280 (E.D.N.Y. 1960)	82

Page

Braen v. Pfeifer Oil Transportation Co., 263 F.2d 147 (2d Cir.), rev'd on other grounds, 361 U.S. 129 (1959) 52

Brandwein v. Provident Mutual Life Insurance Co. 3 N.Y.2d 491, 168 N.Y.S.2d 964 (1957) 21

Brick v. Cohn-Hall-Marx Co., 276 N.Y. 259, 264, 11 N.E.2d 902, 904 (1937) 71

Casey v. American Export Lines, Inc., 173 F.2d 324, rev'd on other grounds, 176 F.2d 337 (2d Cir.) cert. denied, 338 U.S. 85 (1949) 51

Chatauqua County Federation of Sportsmens Club, Inc. v. Caflisch, 15 A.D.2d 260, 222 N.Y.S.2d 835 (4th Dep't 1962) 33

Drydock Knitting Mills, Inc. v. Queens Machine Corp., 254 App. Div. 568, 2 N.Y.S.2d 717 (2d Dep't 1938) 71

Dunn v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 279 F. Supp. 937 (S.D.N.Y. 1968) 84

Electronic Speciality Co. v. International Controls Corp., 47 F.R.D. 158 (S.D.N.Y.), modified on other grounds, 409 F.2d 937 (2d Cir. 1969) 83

Equitable Life Assurance Society of United States v. Kaplan, 168 Misc. 24, 5 N.Y.S.2d 154 (Sup. Ct. N.Y. Co. 1938), aff'd, 258 App. Div. 1038, 17 N.Y.S.2d 1005 (1st Dep't 1940) 21

Farmer v. Arabian American Oil Co., 277 F.2d 46 (2d Cir. 1960) 21

Page

Farr v. Newman,
14 N.Y.2d 183, 250 N.Y.S.2d
272 (1964) 31

Faske v. Gershman,
30 Misc. 2d 442, 215 N.Y.S.2d
144 (Mun. Ct. N.Y. Co. 1961) 46

Feigen v. Green Harbor Beach
Club, Inc.,
25 Misc. 2d 101, 204 N.Y.S.2d
381 (Sup. Ct. Nassau Co. 1960) 21

Feyh v. Brandtjen & Kluge, Inc.,
1 A.D.2d 1013, 151 N.Y.S.2d
454 (2d Dep't 1956), aff'd,
3 N.Y.2d 971, 169 N.Y.S.2d
38 (1957) 46

Finale v. Anderson,
427 F.2d 172 (2d Cir. 1970),
cert. denied, 401 U.S. 915
(1971) 51

First National Bank v. Commercial Travellers'
Home Association of America,
108 App. Div. 78, 95 N.Y.S. 454
(3d Dep't 1905), aff'd, 185 N.Y.
575, 78 N.E. 1103 (1906) 40

Fleming v. McEnany,
491 F.2d 1353 (2d Cir. 1974) 22

Fox v. Heatherton,
281 App. Div. 748, 118 N.Y.S.2d
156 (2d Dep't 1953) 20

Gill v. Jamaica Bay Manufacturing Co.,
171 App. Div. 165, 157 N.Y.S.
52 (2d Dep't 1916) 34

Hedman v. Security Title & Guaranty Co.,
245 App. Div. 224, 281 N.Y.S.
565, 569 (3d Dep't 1935) 34

Hyde v. Lipiec,
12 Misc. 2d 107, 173 N.Y.S.2d
901 (Sup. Ct. Erie Co. 1958) 21

Page

Jerry Vogel Music Co. v. Forster Music Publisher, 147 F.2d 614 (2d Cir.), cert. denied, 325 U.S. 880 (1945) 51

Kent v. Quicksilver Mining Co., 78 N.Y. 159, 187 (1879) 40

Leader v. Dinkler Management Corp., 26 A.D.2d 642, 272 N.Y.S.2d 397 (2d Dep't 1966), aff'd, 20 N.Y.2d 393, 283 N.Y.S.2d 281 (1967) 46

Leary v. Geller, 224 N.Y. 56, 120 N.E. 31 (1918) 20

Leviten v. Bickley, Mandeville & Wimple, Inc., 35 F.2d 825 (2d Cir. 1929) 40

Liberal Civic Club v. Poli, 284 App. Div. 1057, 135 N.Y.S.2d 814 (2d Dep't 1954) 40

Maresco v. Flota Mercante Grancolombiana, S.A., 167 F. Supp. 845 (E.D.N.Y. 1958) 84

McGovern v. City of New York, 234 N.Y. 377, 138 N.E. 26 (1925) 21

McKenzie v. Harrison, 120 N.Y. 260, 24 N.E. 458 (1890) 18

Merritt v. Bissell, 155 N.Y. 396, 50 N.E. 280 (1898) 40

Montagnino v. Brojer, 29 Misc. 2d 651, 214 N.Y.S.2d 208 (Mun. Ct. N.Y. Co. 1960) 31

Page

Morgan Guaranty Trust Co. v. Metcalf, 28 Misc. 2d 1057, 214 N.Y.S.2d 77 (Sup. Ct. N.Y. Co. 1961) 21

Nixon v. Leitman, 32 Misc. 2d 461, 224 N.Y.S.2d 448, 452 (Sup. Ct. N.Y. Co. 1962) 41

Nobles v. Higgins, 214 App. Div. 135, 211 N.Y.S. 833 (3d Dep't 1925), aff'd, 243 N.Y. 538 (1926) 20

Norman v. Federal Mining and Smelting Co., 180 App. Div. 325, 167 N.Y.S. 794 (1st Dep't 1917) 34, 40

Noto v. Satloff, 38 Misc. 2d 915, 239 N.Y.S.2d 324 (Civil Ct. N.Y. Co. 1963) 18

Orvis v. Higgins, 180 F.2d 537 (2d Cir.), cert. denied, 340 U.S. 810 (1950) 52

Oscar Gruss & Son v. Lumbermens Mutual Casualty Co., 46 F.R.D. 635 (S.D.N.Y. 1969) 84

Palmer v. New York Herald Company, 228 App. Div. 176, 239 N.Y.S. 619, 627 (1st Dep't), aff'd, 255 N.Y. 572, 174 N.E. 318 (1930) 34

Palum v. Lehigh Valley R.R., 165 F.2d 3 (2d Cir. 1948) 52

Park v. Village of Waverly, 457 F.2d 1139 (2d Cir. 1972) 51, 52

Pernet v. Peabody Engineering Corp., 20 A.D.2d 781, 248 N.Y.S.2d 132 (1st Dep't 1964) 65

Page

Port Chester Electrical Construction Corp. v. Hastings Terraces, 284 App. Div. 966, 134 N.Y.S.2d 656 (2d Dep't 1954) 46

Radiation Dynamics, Inc. v. Goldmuntz, 464 F.2d 876 (2d Cir. 1972) 22

Ryan v. Arabian American Oil Co., 18 F.R.D. 206 (S.D.N.Y. 1955) 82

Ryder Truck Rental, Inc. v. Williamstown Wire & Cable Co., 62 Misc. 2d 848, 309 N.Y.S.2d 508 (Sup. Ct. Onondaga Co. 1970) 33

Santos v. National Bank, 130 Misc. 348, 223 N.Y.S. 817 (Sup. Ct. Warren Co. 1927) 40

Schub v. Bakers Mutual Insurance Co., 24 Misc. 2d 930, 205 N.Y.S.2d 685 (Sup. Ct. N.Y. Co. 1960) 34

Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Machine Co., 90 N.Y. 607, 613 (1882) 40

Simblest v. Maynard, 427 F.2d 1 (2d Cir. 1970) 22

Simmons v. Westwood Apartments Company, 46 Misc. 2d 1093, 261 N.Y.S.2d 736 (Sup. Ct. Onondaga Co. 1965), aff'd, 26 A.D.2d 764, 271 N.Y.S.2d 731 (4th Dep't 1966) 33

Simon v. Etgen, 213 N.Y. 589, 107 N.E. 1066 (1915) 64

Strong v. Sheffield, 144 N.Y. 392, 39 N.E. 330 (1895) 21

Trade Development Bank v. Continental Insurance Co., 469 F.2d 35 (2d Cir. 1972) 52

Page

VTR, Inc. v. Goodyear Tire & Rubber Co., 303 F. Supp. 773, 779 (S.D.N.Y. 1969) 71

Van Valkenburgh Nooger & Neville, Inc. v. Hayden Publishing Co., 33 A.D.2d 766, 306 N.Y.S.2d 599 (1st Dep't 1969), aff'd, 30 N.Y.2d 34, 330 N.Y.S.2d 329, cert. denied, 409 U.S. 875 (1972) 64

Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917) 64

Woodard v. Southampton Federal Savings & L. Ass'n, 161 N.Y.S.2d 522 (Sup. Ct. Kings Co. 1957) (Not officially reported) 34

Young Foundation Corp. v. A.E. Ottaviano, Inc., 29 Misc. 2d 302, 216 N.Y.S.2d 448 (Sup. Ct. Westch. Co.), aff'd, 15 A.D.2d 517, 222 N.Y.S.2d 685 (2d Dep't 1961) 18

OTHER AUTHORITIES:

5 J. Moore, Federal Practice ¶ 38.08 at 89-90 (2d ed. 1974) 51

6 J. Moore, Federal Practice § 54.70 at 1305-06 (2d ed. 1974) 82

Restatement (Second) of Agency § 94, (1958) 40

Restatement (Second) of Agency § 98, (1958) 34

Restatement of Contracts § 250, 395 (1932) 20

5 S. Williston on Contracts § 675 (3d ed. 1961) 20

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket Nos. 74-1584
74-1636

SCIENTIFIC HOLDING COMPANY, LTD.,

Plaintiff-Appellant,

- against -

PLESSEY INCORPORATED,

Defendant-Appellee.

ANSWERING BRIEF OF DEFENDANT-APPELLEE

ISSUES PRESENTED

1. Whether the trial judge properly held that the March 2 amendment concerning management control was valid as a matter of law.

2. Whether the jury verdicts that (a) Plessey did not breach the contract by assuming management control,

(b) did not breach the good faith provision of the contract following the take-over, and (c) did not defraud plaintiff are supported by substantial evidence.

3. Whether Plessey is entitled to judgment on its counterclaim for breach of contract representations and warranties notwithstanding the jury verdict to the contrary.

4. Whether Plessey is entitled to costs as the prevailing party and, if so, whether witnesses' travel expenses should be limited to 100 miles under the circumstances of this case.

COUNTERSTATEMENT OF FACTS

Plaintiff-appellant Scientific Holding Company, Ltd. ("plaintiff") is a corporation organized under the laws of the State of Illinois* and is a successor in interest to International Scientific Ltd. ("ISL"), a

---

* Plaintiff is not engaged in any business activity but has been continued in existence to prosecute this litigation; plaintiff has no assets other than the claims asserted in this action and the balance of the $180,000 payment by Plessey.

corporation organized under the laws of Barbados, West Indies. ISL was organized in 1966 by E. Allan Kovar and two friends for the purpose of engaging in the manufacture and assembly of various components to be supplied primarily to the United States computer and peripheral equipment industries.

Defendant-appellee Plessey Incorporated ("Plessey") is a corporation organized under the laws of the State of Delaware with its principal office in the State of New York and is a wholly owned subsidiary of The Plessey Company Limited, an English company.* Unless otherwise indicated all references to "Plessey" are to the named defendant.

From 1967 until June 1970, when Plessey assumed the management of ISL, Kovar was chief executive officer of ISL. Prior to the organization of ISL, Kovar had been a practicing attorney in Chicago and had no previous experience in the management or operation of a business. Furthermore, he had no prior experience with any of the

---

* The agreement dated February 4, 1970 (Ex. 3, E. 46) was between ISL and The Plessey Company Limited. Plessey Incorporated was substituted as the party to the agreement prior to the closing for reasons not relevant to this appeal (Ex. 4, E. 72).

products manufactured by ISL (A. 172-74, 179-80).* In 1967 and 1968 ISL had sales of $125,000 and $417,500 on which it experienced operating losses of $250,000 and $477,000, respectively (Ex. DT; E. 359).** By August 1969, the company was running short of working capital, was unable to raise equity or debt financing and, therefore, determined that a sale of the business would be necessary if the shareholders were to recover any of their investment (A. 191, 554-55).

Simultaneously, in mid-1969, The Plessey Company Limited, which had been successfully marketing computer component products in Europe from manufacturing facilities in Lisbon and Malta, determined to enter the United States market. In September 1969, the Board of Directors of The Plessey Company Limited approved a plan for attaining this goal and assigned responsibility for the project to Warren J. Sinsheimer, Chairman of the Board of Plessey and a member

---

* All material appearing in the Deferred Appendix, prepared by Plaintiff-Appellant, is cited only by reference to the page of the Appendix at which said material is reproduced (e.g., "A. ___") except that citations to Exhibits are cited to both the original document and to the Book of Exhibits (e.g., "Ex. ___,""E.___"). In addition, the following abbreviations are used: "Doc." refers to a document in the Record on Appeal followed by the number assigned to the document in the Index to the Record on Appeal. "Br." refers to Plaintiff-Appellant's main brief. Exhibits G, X and Z as well as the entire judgment will be reproduced for the Court in a Supplemental Appendix (e.g., "Ex. G, SE.___").

** Ex. DT, a 1968 financial statement of ISL, is expressed in BWI dollars, Barbadian currency, which at the time was equal to $.50 U.S. (A. 186).

of the Board of Directors of The Plessey Company Limited (A. 1046, 1062; Ex. 71, E. 183). Plessey was then faced with the usual business consideration of whether to create its own facility from scratch or to acquire an existing company.

In December 1969, Plessey learned of the availability of ISL's business and a meeting in New York was arranged with Kovar on December 9 (A. 1672). Kovar gave Sinsheimer a short description of the business and an unaudited balance sheet and statement of profit and loss for ISL as of October 31, 1969 (A. 355, 1673). The latter showed an operating loss of approximately $151,000 on sales of about $993,000 for the first ten months of ISL's 1969 fiscal year (Ex. A, E. 279). Kovar represented that the company had developed a trained production staff, had hired a network of United States marketing representatives who had established good relations with the principal United States purchasers of computer component parts, and that ISL had in hand substantial orders of approximately $3,000,000 which would enable ISL to turn the corner and become profitable in 1970 (A. 197-98, 200-01, 1056). The acquisition of ISL, therefore, interested Sinsheimer because it would enable Plessey to save substantial time and money in gaining entry into the United States market (A. 1047-48).

Within a few days after Kovar's meeting with Sinsheimer, Milton H. Albert, Plessey's comptroller, and R.D. Osborne, a production engineer from The Plessey Company's Lisbon plant, went to Barbados (A. 1672). Osborne, who was exclusively concerned with manufacturing operations, concluded that with certain improvements the Barbados facility was capable of efficient production (Ex. 10, E. 92).

Since Kovar had remained in the United States, Albert discussed the financial condition of the company with Edward Hourihan, ISL's comptroller (A. 1672-73). Albert obtained audited financial statements for 1967 and 1968 (Ex. DT, E. 359) and an unaudited statement for the 11 months ended November 30, 1969 (A. 1673, 1676; Ex. M, E. 284). The November statement, consistent with the October statement (Ex. A, E. 279, p. 5, supra), showed an 11-month loss of approximately $169,000 on sales of about $1,081,000 (Ex. M, E. 284). Hourihan further told Albert that the loss for the month of December would be approximately $27,000 (A. 1676-77, 1731, 1740-41; Ex. 118, E. 277, l. 20) and therefore the expected year-end loss would be approximately $200,000 (A. 1676-77).

Albert also obtained ISL's budget for 1970. Kovar and Hourihan projected a profit of approximately $360,000 on sales of approximately $2,500,000 for the calendar year 1970 (Ex. 13, E. 117).

Upon his return to New York, Albert reported to Sinsheimer that the company was insolvent and that its only value to Plessey would be as a viable production facility if it could be operated profitably in the future (A. 1713-14). Kovar agreed that ISL's only selling point was its future (A. 204).

After further negotiation, Plessey agreed to assume ISL's liabilities and to pay $180,000 at closing and an additional payment of up to $1,260,000 contingent upon ISL's achieving the $360,000 profit shown in Kovar's 1970 budget (Ex. 13, E. 117) during the "measuring year," the 12-month period commencing on the first day of the month following the closing (April 1, 1970 through March 31, 1971). If profits of less than $360,000 were achieved, the final payment would be reduced proportionately on a 3.5 to 1 ratio (e.g., profits of $200,000 would result in a payout of $700,000) (Ex. 3, p. 7, E. 53).

Plessey also wished to assume control of the business at the closing. ISL, however, wished to remain in management control during the entire 12-month measuring period (A. 1393). Julius Lewis, a partner in the Chicago law firm of Sonnenschein, Levinson, Carlin, Nath & Rosenthal, attorneys for ISL, proposed a compromise of this

issue to Plessey's attorney, Seth H. Dubin.* ISL management would be allowed to remain in management control of the business following the closing provided that ISL management achieved certain profit levels within a specified period of time (A. 632-34; Ex. 6, E. 76).

The second draft of the agreement provided that ISL management would be required to have profits of at least $15,000 in the third month of the measuring year and in each remaining month of the measuring year through March 1971 (Ex. K, pp. 5-6, E. 282-83). There was no provision for averaging of any kind (A. 635, 1127-30, 1395).

On January 31, 1970, ISL held a meeting of its Board of Directors to consider the proposed agreement (Ex. 2, E. 22 - the second draft). The Board approved the contract and authorized Kovar to negotiate further with respect to several items. On the subject of management control, Kovar was to seek Plessey's agreement to include an averaging concept which Lewis had originally proposed (A. 574-75).

Kovar discussed these changes with Lewis who had not attended the Board meeting. Lewis then conferred with Dubin by telephone in making these final changes (A. 635-36).**

---

*Dubin and Sinsheimer are partners in the New York law firm of Sinsheimer, Sinsheimer and Dubin.

**The other items were agreed to by Plessey and are not relevant to this appeal.

Lewis and Dubin agreed to modify the language of paragraph 5(d) of the second draft (Ex. 2, E. 22) and a new provision permitting averaging of monthly earnings was inserted in the final agreement (Ex. 3, E. 46) which was signed by Kovar on February 4, 1970 (A. 1399). The final agreement (Ex. 3, E. 46) did not contain the precise language agreed upon, however, and the error was corrected by a letter from Lewis to Dubin dated February 18, 1970 (Ex. 4, E. 72).

The assets which Plessey was to acquire under the contract included a villa on the island of Barbados in which Kovar had been living. In late January Kovar notified Albert that ISL was so short of working capital that it would be unable to meet its payrolls for the month of February unless ISL sold the villa for which Kovar claimed to have an offer of $80,000 (A. 1684, 1722). Plessey determined that the villa should be kept and, therefore, offered to advance $84,000 for the villa immediately (A. 1065, 1684-85, 1722).

Albert went to Barbados to retain legal counsel to arrange transfer of title to the villa and to insure that the proceeds of the sale were placed in an account which could be used only for ISL's payroll and current

operating expenses.* Albert did not acquire any additional financial information from Kovar or Hourihan during this trip (A. 1685-87).

The visit by Osborne and Albert to Barbados in December and the second visit by Albert were the only visits to Barbados by any persons associated with Plessey prior to the signing of the contract in New York on February 4, 1970.

On February 17-19, 1970, Donald G. Clarke and Norman J. Crocker visited Barbados on behalf of Plessey. Crocker was the director of The Plessey Company Limited's components group which manufactured and sold Plessey's computer components products in Europe. Clarke, the president of a Plessey subsidiary based in Farmingdale, Long Island, was designated by Sinsheimer to be responsible administratively for ISL following the closing (A. 1197). Neither Clark nor Crocker were involved in any of the negotiations, in the financial aspects of the business or in the drafting of the agreement (A. 1072, 1161-62).

---

* This was necessary because of the danger that the banks to whom ISL was indebted would attempt to seize the $84,000 as a setoff against ISL's debts. Kovar had advised Plessey that one of the banks had immediately seized the proceeds of an earlier loan to ISL (A. 1685).

Clarke and Crocker travelled to Barbados to inspect the manufacturing facility and to determine what assistance Plessey could offer to ISL to increase its manufacturing efficiency (A. 1198).

Clarke and Crocker returned to New York on February 20, 1970 and prepared a report of their trip (Ex. 111, E. 213). This report contained a draft of ISL's financial statement for the fiscal year ended December 31, 1969 showing a loss of approximately $395,000, almost double what Hourihan had represented to Albert (pp. 6-7, supra). Unaware of this significance of this statement, Clarke did not distribute the report until March 2, the date of the closing (A. 1066, 1155-58; Ex. AT, E. 308). Clarke did not have any discussions with Albert, Sinsheimer or Dubin between the date of his return and the closing (A. 1200). Albert, Sinsheimer and Dubin testified that none of them had learned of the discrepancy in the year-end loss or discussed any amendment of the agreement until the day of the closing and none of them had seen the Clarke report or discussed the trip with Clarke or Crocker prior to the closing (A. 1066, 1079, 1125, 1147-48, 1154-62, 1416-17, 1431, 1717-19). Plaintiff offered no testimony or other evidence to the contrary.

ISL was represented at the closing on March 2 and 3 by Kovar and Lewis; Plessey by Albert and Dubin. The closing took place in Kovar's office in the ISL plant in Barbados. Albert, however, spent considerable time with Hourihan in another office reviewing the financial information required for the closing. These discussions took place out of the presence of Kovar, Lewis and Dubin (A. 640-41). Albert testified without contradiction with respect to his conversations with Hourihan at the closing.

ISL represented in the agreement that January and February losses would not exceed $20,000 a month (Ex. 3, pp. 9, 12, E. 56, 59). Hourihan reported to Albert that ISL had experienced operating losses for the months of January and February aggregating $74,000 (A. 1689, 1691-92). Hourihan gave this information to Albert orally because he had not yet been able to prepare a written statement for the just concluded month of February (A. 1692).

Hourihan also gave Albert a balance sheet and a statement of profit and loss of ISL for the fiscal year ended December 31, 1969. Hourihan certified that these statements presented fairly the state of the company's affairs and its loss for the year (A. 1689; Ex. AZ, E. 318).

The November statement (Ex. M, E. 284), upon which Plessey relied in signing the February 4 agreement,* had shown 11-month results of $1,081,000 in sales with a gross profit of approximately $216,000 and an operating loss of $169,000. ISL had represented that December's results would not increase this loss beyond $200,000 (pp. 6-7, supra). The year-end statement delivered at the closing (Ex. AZ, E. 318), however, showed sales of only $1,083,000, a gross profit of only $36,000 and an operating loss for 12 months of $399,000. Thus, the two statements showed a tremendous increase in the cost of sales, from $864,000 for 11 months to $1,045,000 for 12 months and a negligible increase in sales ($2,000) (Ex. M, E. 284; Ex. AZ, E. 318). In addition, the balance sheet revealed that ISL's liabilities exceeded its assets by approximately $200,000 more than the November statement had disclosed (A. 1688-91; Ex. M, E. 284; Ex. AZ, E. 318). Albert, therefore, concluded that Plessey would be required to invest $800,000 immediately rather than $600,000 (A. 1689-90).

---

* Although the agreement required a year-end statement (Ex. 3, ¶10(c)(ii) and (iv), E. 57-58), that statement was not available on February 4 (A. 1724). The parties signed the agreement because ISL's financial condition required consummation of the transaction as soon as possible to avoid ISL's collapse and the loss of its customers which was the only value of the business to Plessey. Even with Plessey's immediate advance of $84,000 for the villa, ISL would have been forced to close down at the end of February (A. 1684; see p. 9-10, supra).

Dubin and Albert refused to close. The information given to Albert by Hourihan represented a breach of a condition of closing contained in paragraph 10(e)(i) of the agreement that ISL would not lose more than $20,000 per month from December 31 to the date of closing (Ex. 3, pp. 9, 12, E. 56, 59). Moreover, Plessey had been induced to enter into the agreement based upon misrepresentations, whether innocent or fraudulent, concerning the liabilities of ISL which Plessey was to assume and the amount of the loss for fiscal year 1969 which was directly relevant to Kovar's representation that ISL had reached the point where it was about to turn the corner and become profitable (A. 1136-37).*

Albert and Dubin reported this information by telephone to Sinsheimer in New York. Sinsheimer's first reaction was that Plessey should call the transaction off because Kovar and Hourihan had materially misrepresented the financial condition of the company to Plessey (A. 1077-78,

---

* In fact, although this information was not available at the closing and is, therefore, not relevant to the Court's determination of the issue, a subsequent audit by Price Waterhouse & Co., at the request of Plessey, showed that even the statement certified by Hourihan at the closing was materially inaccurate and that in fact ISL and sustained a loss of $544,000 on sales of $1,083,000 for fiscal year 1969 (A. 1341-42; Ex. BC, p. 4, E. 326). Thus, the actual 1969 loss was more than triple the $169,000 loss shown on the November statement (Ex. M, E. 284).

1152, 1414, 1689). The revelations also caused Sinsheimer to question Kovar's additional representations that, under his management, the company would begin to show a profit in a few months (A. 1165-66). After further discussion, Sinsheimer, Albert and Dubin decided that Plessey would go forward with the transaction if ISL agreed to two amendments. First and more importantly, Sinsheimer, who had been reluctant to allow ISL management to remain in control for any period of time, instructed Dubin and Albert to shorten the period in which ISL management would be required to show a profit of $15,000 to the end of May (A. 1165-66, 1417-18). He further directed that ISL pay interest of 10% on the additional $200,000 investment and that this interest charge be debited against the operating results of the company for the measuring year.*

After further discussion between the participants at the closing, the parties agreed to amend the contract in these repsects and their agreement was reduced to writing and signed by Albert and Kovar (Ex. 5, E. 74).

---

* The agreement provided that Plessey would make no charge against the profit and loss of the company for interest on the $600,000 investment required of Plessey under the February 4, 1970 agreement.

ISL failed to achieve the $15,000 profit in May. As a result, Plessey notified ISL by letter dated June 9, 1970 that it was assuming management control of the business (Ex. 26, E. 152). Despite the investment by Plessey, not of $800,000 but rather $1,900,000, the business experienced a $640,000 loss on sales of $1,300,000 for the measuring year (A. 1354-56, 1361-63; Ex. BE, pp. 5-7, E. 335-37). Plessey, therefore, notified ISL that it would make no further payment under the agreement (Ex. 32).

ARGUMENT

I

JUDGE BONSAL'S DETERMINATION THAT THE MARCH 2 AMENDMENT WAS VALID AS A MATTER OF LAW SHOULD BE AFFIRMED

Plaintiff's principal claim on appeal is that the March 2 amendment concerning management control was invalid because: (1) the amendment lacked legal consideration; (2) Kovar did not have the requisite authority to agree to the amendment; and (3) the amendment was illegally coerced by Plessey. Judge Bonsal rejected these arguments and upheld the amendment as a matter of law.

Judge Bonsal's determination was based upon elementary principles of contract law and plaintiff makes no claim on this appeal that Judge Bonsal's ruling involved any error of law. As a result, the judgment below must be affirmed because Judge Bonsal applied those principles to undisputed facts in the record which could lead to only one legal conclusion.

A. Alleged Lack of Consideration Was Not Available as a Defense

The parties agreed in paragraph 19 that the agreement should be interpreted and governed by the laws

of the State of New York (Ex. 3, p. 24, E. 71). New York has provided by statute that an amendment or modification of an agreement, if made in writing and signed by the parties, is enforceable whether or not the additional provision is supported by consideration (New York General Obligations Law, Section 5-1103 (McKinney 1963)).

Moreover, consideration relates to the enforceability of an agreement and therefore cannot be used to attack an executed contract. McKenzie v. Harrison, 120 N.Y. 260, 24 N.E. 458 (1890); Young Foundation Corp. v. A.E. Ottaviano, Inc., 29 Misc. 2d 302, 216 N.Y.S.2d 448 (Sup. Ct. Westch. Co.), aff'd, 15 A.D.2d 517, 222 N.Y.S.2d 685 (2d Dep't 1961); Noto v. Satloff, 38 Misc. 2d 915, 239 N.Y.S.2d 324 (Civil Ct. N.Y. Co. 1963). Judge Bonsal's rejection of plaintiff's consideration argument was well founded on either of these grounds.

Furthermore, assuming consideration were necessary, there is uncontroverted evidence in the record to support such a legal conclusion. The fact that ISL had lost $74,000 for the months of January and February and the fact that ISL had misrepresented the liabilities and year-end loss of ISL by approximately $200,000 were undisputed (pp. 12-14 supra). Given these undisputed facts, it was purely a question of law for Judge Bonsal to determine whether:

(a) Plessey's performance under the agreement (i.e., its obligation to go through with the closing) was excused because the $74,000 loss was a breach of a condition precedent in paragraph 10(e)(i) that ISL would not lose more than $20,000 per month between December 31, 1969 and the date of closing;* and/or

(b) Plessey's performance was excused because the $200,000 misrepresentation, whether innocent or fraudulent, entitled Plessey to rescind the transaction.

---

* Paragraph 10(e)(i) provides (Ex. 3, pp. 9, 12, E. 56, 59):

"10. ISL represents and warrants:

* * *

"e. Since December 31, 1969, there has not been:

(i) Any change in ISL's financial condition, assets, liabilities or business, other than changes in the ordinary course of business, the sale of the property which has been the residence of E. Allan Kovar, and the writing off of approximately Twenty Thousand ($20,000.00) U.S. Dollars of testing equipment. Operating losses not at a rate in excess of Twenty Thousand ($20,000.00) U.S. Dollars per month for the period from December 31, 1969 to the closing hereof shall not constitute an out of the ordinary change of ISL's condition."

The law clearly supports Plessey's right to refuse further performance under the agreement on either of these grounds. New York law requires that conditions precedent to one party's obligation be exactly performed by the other party. If the other party fails to perform, the first party is excused from its performance under the agreement. Amies v. Wesnofske, 255 N.Y. 156, 174 N.E. 436 (1931); Nobles v. Higgins, 214 App. Div. 135, 211 N.Y.S. 833 (3d Dep't 1925), aff'd, 243 N.Y. 538 (1926); Axelrath v. Spencer Kellogg & Sons, Inc., 33 N.Y.S.2d 94, aff'd, 265 App. Div. 874, 38 N.Y.S.2d 39 (2d Dep't 1942), aff'd, 290 N.Y. 767, 50 N.E.2d 103, cert. denied, 320 U.S. 761 (1943); 5 S. Williston on Contracts § 675 (3d ed. 1961); Restatement of Contracts § 250, 395 (1932).

Moreover, Plessey was entitled to rescind the contract and refuse further performance because of the material misrepresentation as to liabilities and the year-end loss. A right to rescind exists even when misrepresentations are made honestly and without the intent to deceive. Albert v. Martin Custom Made Tires Corp., 116 F.2d 962 (2d Cir. 1941); Leary v. Geller, 224 N.Y. 56, 120 N.E. 31 (1918); Bloomquist v. Farson, 222 N.Y. 375, 118 N.E. 855 (1918); Fox v. Heatherton, 281 App. Div. 748, 118 N.Y.S.2d 156 (2d Dep't 1953); Bond & Goodwin, Inc. v.

DuPont, 254 App. Div. 543, 5 N.Y.S.2d 423 (1st Dep't 1938), aff'd, 280 N.Y. 715, 21 N.E.2d 211 (1939); Equitable Life Assurance Society of the United States v. Kaplan, 168 Misc. 24, 5 N.Y.S.2d 154 (Sup. Ct. N.Y. Co. 1938), aff'd, 258 App. Div. 1038, 17 N.Y.S.2d 1005 (1st Dep't 1940). Even though a representation did not appear in the written agreement, a party is entitled to rescind on the basis of oral representations outside the contract if the contract does not expressly exclude such reliance. Farmer v. Arabian American Oil Co., 277 F.2d 46 (2d Cir. 1960); see Brandwein v. Provident Mutual Life Insurance Co., 3 N.Y.2d 491, 168 N.Y.S.2d 964 (1957); Feigen v. Green Harbor Beach Club, Inc., 25 Misc. 2d 101, 204 N.Y.S.2d 381 (Sup. Ct. Nassau Co. 1960).

Plessey had the right to refuse to go forward with the contract on either of these grounds. Plessey's waiver of its right to refuse to close was adequate consideration as a matter of law. McGovern v. City of New York, 234 N.Y. 377, 138 N.E. 26 (1925); Strong v. Sheffield, 144 N.Y. 392, 39 N.E. 330 (1895); Morgan Guaranty Trust Co. v. Metcalf, 28 Misc. 2d 1057, 214 N.Y.S.2d 77 (Sup. Ct. N.Y. Co. 1961); Hyde v. Lipiec, 12 Misc. 2d 107, 173 N.Y.S.2d 901 (Sup. Ct. Erie Co. 1958).

Plaintiff suggests that Judge Bonsal directed a verdict as to the validity of the amendment and that such direction was erroneous because plaintiff had introduced sufficient factual evidence from which the jury could infer that consideration was lacking. This is an erroneous test for Judge Bonsal did not direct a verdict as to the amendment. On the contrary, he decided as a matter of law that lack of consideration was not a valid defense. Even if we assumed, however, that Judge Bonsal directed a verdict, the judgment should be affirmed because plaintiff introduced no evidence on any factual matter relevant to the legal holding which would sustain an argument that reasonable men could disagree as to the conclusion reached. Fleming v. McEnany, 491 F.2d 1353 (2d Cir. 1974); Radiation Dynamics, Inc. v. Goldmuntz, 464 F.2d 876 (2d Cir. 1972); Simblest v. Maynard, 427 F.2d 1 (2d Cir. 1970). As this Court stated in Simblest, the standard for review on a directed verdict is (427 F.2d at 4): "[w]hether the evidence is such that, without weighing the creditability of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men can have reached."

Plaintiff's brief concedes that operating losses for the months of January and February aggregating

more than $40,000 was a breach of the condition precedent to Plessey's obligation to perform (Br. 17; Ex. 3, ¶¶ 10(e)(i) and 13(b), E. 57-58). Kovar and Lewis had proposed this figure for inclusion in paragraph 10(e)(i) (A. 407-08, 1407-08). Plaintiff urges as the sole ground for reversal that there was a question of fact concerning the amount of the loss for January and February and, therefore, this issue should have been submitted to the jury. There are two things wrong with this argument: (1) it ignores the New York law which does not require consideration for an amendment in writing and (2) it is based on misstatements of the record.

At the closing, Hourihan, ISL's comptroller, advised Albert that ISL had lost $74,000 for the months of January and February. Hourihan did not furnish Albert with any breakdown of that loss nor had he prepared a written statement of the items comprising that loss (A. 1189, 1433, 1691-92, 1723). At the closing, no one indicated to Albert that the $74,000 loss included extraordinary items which should have been excluded for purposes of the calculation of ordinary operating expenses under paragraph 10(e)(i) of the agreement (A. 1691-92, 1723).

Plaintiff points (Br. 17) to a financial statement which plaintiff's witnesses conceded was not prepared until after the closing and was, therefore, not available to the parties at closing (A. 678-79, 1433-34; Ex. R, E. 294). Plessey, not plaintiff, introduced this financial statement and it did so to demonstrate that, even after the dispute at closing, when Hourihan eventually prepared a written statement for January and February, it showed the same $74,000 loss which he had orally reported to Albert at the closing (A. 443-44; Ex. R, E. 294).

Plaintiff argues that the $74,000 loss should have been reduced by unspecified legal and audit expenses of approximately $19,000 and a group of expenses labeled "Money Expenses" totalling approximately $17,000 (Br. 17; Ex. R, p. 7, E. 298).* Plaintiff offered no evidence at trial as to whether these items were incurred in the ordinary course of operating the business or were of an extraordinary nature.**

---

* Plaintiff cites an unsolicited comment by Kovar on cross-examination that the $74,000 loss included approximately $20,000 for "special bank charges" (Br. 17; A. 453). The statement contains no entry in that amount but rather shows three separate categories pertaining to leases, bank interest and "other" interest aggregating $17,000 (Ex. R, p. 7, E. 298).

** Although all of ISL's records were made available to plaintiff through discovery and although Kovar must have known the recipients of these payments, plaintiff did not attempt to show any special or extraordinary nature for any of the three categories of interest or the legal and audit expenses.

Plaintiff displays a lack of candor, to say the least, by asserting that Albert admitted that these items represented extraordinary expenses (Br. 17). In fact, at the page cited by plaintiff, Albert testified (A. 1723):

> "Q My question, Mr. Albert, is whether the loss figure [referring to DX R] includes $19,000 approximately of legal and audit expense and sixteen or seventeen thousand of bank interest expense?
>
> "A Yes, it does."

Plaintiff's counsel did not even inquire as to Albert's opinion concerning the ordinary or extraordinary nature of the items (A. 1723).

Plaintiff also argues that Plessey cannot rely upon the $200,000 discrepancy between the November and December statements (Ex. M, E. 284 and Ex. AZ, E. 318; pp. 12-13, supra) because ISL made no written representation to Plessey concerning the accuracy of the November statement. Plaintiff does not dispute that the November statement was given to Albert or that it shows a loss of $169,000 (Ex. M, E. 284). Plaintiff offered no testimony to rebut Albert's testimony that Hourihan represented that: (1) the loss for December would be $27,000 which figure Albert recorded in his notes made at the time of his visit, and (2) ISL would not lose more than $200,000 in 1969 (A. 1060, 1676-77, 1713, 1731, 1740-41; Ex. 118, E. 277, l. 20).

Plaintiff seeks to divert attention from the real issue by arguing that there is a question of fact concerning Albert's analysis at closing and the conclusion he reached that the actual year-end loss of $399,000 required immediate investment by Plessey of an additional $200,000.

Plaintiff's argument (Br. 15) is based on another alleged "admission" by Albert that the subtraction of the $180,000 down payment to ISL from the $800,000, which he calculated on March 2 was required in the way of additional capital, results in a figure of approximately $600,000, the amount provided in the agreement. In other words, plaintiff contends that Albert "admitted" that the additional capital required at the closing was no greater than it was at the date the agreement was signed. This is not what Albert said in his allegedly "crucial" testimony (A. 1721). Moreover, Albert repeatedly testified that when he calculated the amount of the required capital -- both at $600,000 and later at $800,000 - he included the $180,000 down payment (A. 1681-84, 1720-21, 1740). The record is perfectly clear that at the closing on March 2 Plessey was faced with the unexpected prospect that an investment of $800,000 (including the down payment) was

required. Plessey agreed to make that additional investment and in fact eventually invested considerable more than $800,000 into ISL.*

In any event, the amount of the required additional investment is irrelevant. The important fact is that ISL's liabilities and 1969 loss was misrepresented and Plessey had a legal right to refuse to close.

Plaintiff also argues that the jury could have found that Plessey knew about the $200,000 misrepresentation prior to March 2 (Br. 16). This argument is based upon the written report prepared by Clarke and Crocker (Ex. 111, E. 213; p. 11, supra), but it ignores the uncontradicted testimony of Sinsheimer, Albert and Dubin that they had not seen the report prior to the closing (p. 11, supra). More importantly, the argument is again completely irrelevant to the question of the misrepresentation. If Plessey relied upon a misrepresentation in the February 4 agreement, a later report has no bearing upon the inducement for the agreement.

---

* Plessey actually invested $1,900,000 during the measuring year - more than double the amount required under the amendment, but still sustained a loss of more than $600,000 during the measuring year (A. 1354-56, 1361; Ex. BE, pp. 5-7, E. 335-37).

Plaintiff finally suggests that the misrepresentation and the breach of condition were adequate consideration only for the amendment requiring 10% interest on the additional $200,000 investment; that that amendment "cured ISL's default"; and, that the second amendment shortening the management control provision was, therefore, not supported by consideration (Br. 18-19). This argument is based entirely upon a third claimed "admission" by Albert (Br. 18). What Albert actually said is directly contrary to plaintiff's position (A. 1726):

> "Q After negotiating back and forth, did ISL agree to be charged with the cost of this additional $200,000 at 10 per cent?
>
> "A Yes, they did.
>
> "Q And wasn't it after that had been agreed to that either you or Mr. Dubin -- I forget which -- said that in addition to that you wanted to shorten the management period by 30 days?
>
> "A No, I think the sequence was we had asked for both amendments at the same time; we did negotiate them separately, but we asked for them at the same time. It was a package."

B. Kovar Was Authorized to Agree to the Closing Amendments

Plaintiff further attacks the amendments by disclaiming the authority of Kovar to modify the contract. Plaintiff betrays the fatal weaknesses of its position by ignoring the documentary evidence which establishes Kovar's authority as a matter of law.

A condition precedent to Plessey's obligation to close was set forth in paragraph 13(d)(ii) of the agreement (Ex. 3, pp. 19-20, E. 66-67):

> "13. All of PLESSEY'S obligations under this Agreement are subject to the fulfillment, prior to or at closing, of each of the following conditions:
>
> * * *
>
> "d. PLESSEY shall have been furnished with an opinion dated the closing date of counsel for ISL, Sonnenschein, Levinson, Carlin, Nath & Rosenthal, to the effect that:
>
> * * *
>
> "(ii) The execution, delivery and performance of this Agreement by ISL have been duly authorized and approved by all requisite action of ISL's Board of Directors and stockholders and that this Agreement has been duly executed and delivered by ISL and constitutes the valid and binding obligation of ISL in accordance with its terms."

At the closing, Lewis delivered to Dubin an opinion letter of the Sonnenschein, Levinson firm in accordance with this provision of the agreement (Ex. AB, E. 306; Ex. DW, E. 367).* Lewis acknowledged that the opinion letter was a condition precedent to Plessey's obligation to close and that Plessey would have had the option of refusing to perform unless the letter was forthcoming (A. 700-03). Lewis admitted that he had no discussion with Dubin or Albert concerning Kovar's authority (A. 691-92); nor did he place any oral reservations on the scope of the opinion letter at any time during the closing (A. 460-62, 703-05, 1424-26).**

Thus, the ISL Board expressly authorized the delivery of the Sonnenschein, Levinson opinion letter when it approved the second draft of the agreement at its January 30 Board meeting (Ex. 2, pp. 19-20, A. 40-41). Plaintiff made no claim at trial that Lewis had exceeded the authority conferred upon him by the Board. Therefore,

---

* Ex. AB is a xerox copy of an unsigned carbon copy of Ex. DW. Through an oversight, Ex. AB was originally introduced and used during the cross-examination of Lewis. On Dubin's testimony a copy of the signed opinion letter delivered at the closing was marked as Ex. DW.

** Lewis did modify the opinion letter which he had originally typed before leaving Chicago to exclude from the scope of that letter any opinion with respect to the merits of a pending claim against ISL in the amount of $550 (A. 1424-25; Ex. DW, E. 367).

ISL is bound by the Sonnenschein, Levinson opinion letter that the transaction was authorized and cannot be heard to disclaim the authorized action of its agent. Farr v. Newman, 14 N.Y.2d 183, 250 N.Y.S.2d 272 (1964); Montagnino v. Brojer, 29 Misc. 2d 651, 214 N.Y.S.2d 208 (Mun. Ct. N.Y. Co. 1960).

Even when viewed under the test suggested by plaintiff, the evidence in the record admits of no other legal conclusion. Plaintiff suggests that Plessey's counsel was not entitled to rely upon the opinion of the Sonnenschein, Levinson firm because at some point during the closing Kovar expressed a "doubt" concerning his authority (A. 249). Dubin and Albert denied that either Lewis or Kovar raised any question concerning Kovar's authority (A. 1419, 1693).

At trial, Lewis testified that Kovar had told Dubin that Kovar ". . . doubted he had authority." (A. 691-92). This testimony must be compared with Lewis' deposition testimony in Chicago on July 17, 1973. There he testified not once, but twice, that he had no recollection of Kovar raising a question of his authority with either Dubin or Albert (A. 697-98). Lewis, who had made no memorandum of the closing, claimed at trial that, notwithstanding his deposition testimony a year earlier, he now

had an independent recollection of Kovar expressing this doubt to Dubin at the closing (A. 698-99).

Disregarding the testimony of Dubin and Albert and accepting as true Kovar's claim that he expressed a doubt concerning his authority, bolstered by the eleventh hour recollection of Lewis, Kovar's offhand expression of doubt is insufficient to raise a triable issue of fact concerning Plessey's right to rely upon the opinion of the Sonnenschein, Levinson firm, delivered without reservation by Lewis.

Finally, plaintiff suggests that the ISL Board minutes approving the transaction and the ISL proxy material (Ex. 8 and 9, E. 79 and E. 85) put Dubin on notice that Kovar lacked authority. Dubin had no recollection of receiving either of these documents (A. 1428-29). Lewis testified that he had given the proxy material to Dubin (A. 728; Ex. 9, E. 85). No one claimed that there was ever any discussion of these documents in connection with Kovar's authority or otherwise. Assuming that Dubin did see the documents, there is nothing on the face of either of them which would have caused Dubin to question the opinion letter delivered by a reputable firm which was specifically authorized in the contract to render such an opinion.

C. Alternatively, the ISL Board Ratified and is Estopped from Challenging Kovar's Actions at Closing

A further ground exists for upholding the validity of the amendments. The undisputed actions of Kovar, Lewis and Carlen and the other members of the ISL Board of Directors following the closing present a classic example of ratification and estoppel. In several communications with Plessey and, indeed, in their own private recorded communications, plaintiff's representatives never raised a question about the validity of the amendments.

It is the law in New York, as elsewhere, that where a party treats a transaction as valid and is silent as to any alleged wrongdoing, then he is deemed to acquiesce in the alleged wrong, and is equitably estopped from later impeaching the act complained of. Chautauqua County Federation of Sportsmens Club, Inc. v. Caflisch, 15 A.D.2d 260, 222 N.Y.S.2d 935 (4th Dep't 1962); Ryder Truck Rental, Inc. v. Williamstown Wire & Cable Co., 62 Misc. 2d 848, 309 N.Y.S.2d 508 (Sup. Ct. Onondaga Co. 1970); Simmons v. Westwood Apartments Company, 46 Misc. 2d 1093, 261 N.Y.S.2d 736 (Sup. Ct. Onondaga Co. 1965), aff'd, 26 A.D.2d 764, 271 N.Y.S.2d 731 (4th Dep't 1966).

A party may not enjoy the terms of a contract and then belatedly attempt to disclaim it on the ground of lack

of corporate authority. Anderson v. Wood Dolson Co., 212 App. Div. 483, 209 N.Y.S. 183 (1st Dep't 1925); Norman v. Federal Mining and Smelting Co., 180 App. Div. 325, 167 N.Y.S. 794 (1st Dep't 1917); Gill v. Jamaica Bay Manufacturing Co., 171 App. Div. 165, 157 N.Y.S. 52 (2d Dep't 1916); Schub v. Bakers Mutual Insurance Co., 24 Misc. 2d 930, 205 N.Y.S.2d 685 (Sup. Ct. N.Y. Co. 1960); Restatement (Second) of Agency § 98 (1958). Thus, where one accepts a down payment and permits the contract to continue over a period of time, that party will be estopped from attacking the validity of the contract and will be deemed to have ratified any alleged defects. Hedman v. Security Title & Guaranty Co., 245 App. Div. 224, 281 N.Y.S. 565, 569 (3d Dep't 1935); Palmer v. New York Herald Company, 228 App. Div. 176, 239 N.Y.S. 619, 627 (1st Dep't), aff'd, 255 N.Y. 572, 175 N.E. 318 (1930). See also, Woodard v. Southampton Federal Savings & Loan Ass'n, 161 N.Y.S.2d 522 (Sup. Ct. Kings Co. 1957) (Not officially reported)

Plaintiff has attempted to create the impression that Kovar and Lewis were under extreme pressure to agree to the amendments, and had no opportunity to consult the Board of Directors. Yet following the closing neither Lewis nor Kovar communicated to the Board that the

management control provision had been modified. Lewis made no report (A. 699-700). Kovar sent each member of the Board a memorandum which advised them of the amendment requiring the additional $200,000 investment but did not mention the amendment of the management control provision (Ex. X, SE. 374). Kovar explained this omission on the ground that, as of March 5, he did not consider that amendment to be significant (A. 472-73).

Plaintiff's witnesses testified that sometime prior to June 9, 1970 there were discussions in Chicago among Kovar, Lewis, Carlen, Matthew Murray, Harold Shapiro and other directors. Matthew Murray, a senior partner in the Chicago law firm of Seyfarth, Shaw, Fairweather & Geraldson, was a shareholder of ISL and along with Carlen was instrumental in raising funds for ISL. Shapiro, one of Lewis' law partners, had participated in the early negotiations but did not participate in the drafting of the agreement.

The alleged purpose of these discussions was to plan Kovar's response at a meeting with Sinsheimer scheduled two days later in New York City. Kovar claimed that he suspected that Sinsheimer would take over management because Kovar had refused to agree to make certain changes

in the operation of the business. It is unclear whether at this time Kovar informed the Board of the modification of the management control provision.

On June 11, 1970 when Kovar was in New York, Albert delivered to him a letter dated June 9, 1970 from Sinsheimer to ISL, giving notice that on the basis of paragraph 5(d) of the agreement, as modified at the closing on March 2, Plessey was assuming management control because ISL had failed to achieve profits of at least $15,000 in the month of May (Ex. 26, E. 152). Kovar showed no surprise and did not question Plessey's interpretation of the amendment or its right to assume control on the basis of May results alone (A. 831-32). His only response was concern over the effect on him personally and in this connection he and Albert negotiated a severance agreement (A. 528-30, 831-32; Ex. AL, E. 310).

Kovar then returned to Chicago and there were further discussions among the ISL Board members and the various attorneys.* Although plaintiff's brief is replete

---

* Plaintiff's witnesses were unable to separate their discussion prior to June 11 and their subsequent discussions. For example, Lewis could not recall whether he participated in the meetings and discussions prior to Kovar's trip to New York or only after Kovar returned to Chicago with the June 9 letter (A. 707-08). Carlen testified that he was not aware of the March 2 amendment until he subsequently saw Sinsheimer's letter (A. 598). All of plaintiff's witnesses admitted, however, that there was a full discussion of the amendment prior to Carlen's response on June 17.

with citations concerning these private discussions to which Plessey, of course, was not privy, plaintiff's brief is silent with respect to ISL's June 17 written response to Sinsheimer (Ex. 27, E. 154), the formal response of the ISL Board composed by its attorney Lewis after full discussion by the Board with attorneys Lewis, Shapiro and Murray and Carlen's personal attorney.

Lewis testified that non-lawyer Carlen alone raised any question concerning Kovar's authority to agree to the amendment but that none of the directors or attorneys suggested that ISL could repudiate the amendment on that ground (A. 707-10). Carlen also admitted that although he thoroughly discussed Kovar's authority with Kovar, Lewis and his personal attorney there was no suggestion by anyone that the amendment was not valid (A. 603).

After all of these discussions, it was decided that Lewis prepare ISL's formal response for Carlen's signature (A. 535-38, 714). Lewis drafted a letter (Ex. AS, E. 316) which he discussed with his partner Shapiro and forwarded to Carlen on June 15 (Ex. AM, E. 315). Lewis also sent a copy to lawyer Murray for his comments (A. 715-16;

Ex. AM, E. 315). Carlen made minor changes in Lewis' draft (Ex. AS, E. 316) and sent his June 17 letter to Sinsheimer (A. 606-09; Ex. 27, E. 154). It was conceded that neither Lewis' draft (Ex. AS, E. 316) nor Carlen's final letter (Ex. 27, E. 154) raised any question concerning Kovar's authority (A. 718).

Finally, on July 13, Carlen and Shapiro met with Sinsheimer in his office in New York City. Carlen claimed that he made the following statement concerning the amendment which in his view placed Plessey on notice that the amendment was unauthorized and the take-over was premature: ". . . there had evidently been an amendment which changed things, which I had not known about, which I didn't believe was proper, and at that moment I had no specific ruling or legal knowledge myself as to whether or not it was, but it seemed as a layman, and in all of the discussions in these kind of things that I have been involved in, it seemed wrong." (A. 543)(Emphasis added).

Sinsheimer flatly denied that either Carlen or Shapiro questioned the validity of the amendment or Plessey's interpretation thereof (A. 1169-71). Significantly, Shapiro, who was called by the plaintiff as a witness, had no recollection of either he or Carlen suggesting to Sinsheimer that the March 2 amendment was invalid for any

reason or that Plessey's take-over was premature under that amendment (A. 734-38).

Following the meeting, Carlen made handwritten notes of the discussion (Ex. 29, E. 158) which were subsequently typed in memorandum form (Ex. 30, E. 160). Although Carlen testified that he had recorded all significant aspects of the discussion (A. 545-46, 610-12), neither of these documents contains any reference to a discussion of the validity or interpretation of the amendment but rather refers to Plessey's assumption of control as an exercise of its rights under the agreement (Ex. 29, E. 158 and Ex. 30, E. 160).

Ignoring Sinsheimer's denial and Shapiro's failure to recall Carlen's confusion as a layman, Carlen's claimed statement was insufficient as a matter of law to put Plessey on notice of any alleged breach of contract in light of the formal opinion letter delivered at closing (Ex. AB, E. 306) and the formal written response of ISL's Board to the Plessey take-over, prepared with the assistance of counsel (Ex. 27, E. 154).

Clearly, Kovar was an agent of ISL who possessed every indicia of authority possible. As president, manager of the business and chief negotiator for ISL, he certainly appeared to be in a position of complete authority. If he

was not so authorized, the Board of Directors was clearly under a duty to repudiate and disaffirm any alleged unauthorized acts within a reasonable time. Leviten v. Bickley, Mandeville & Wimple, Inc., 35 F.2d 825 (2d Cir. 1929); Merritt v. Bissell, 155 N.Y. 396, 50 N.E. 280 (1898); Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Machine Co., 90 N.Y. 607, 613 (1882); Kent v. Quicksilver Mining Co., 78 N.Y. 159, 187 (1879); Liberal Civic Club v. Poli, 284 App. Div. 1057, 135 N.Y.S.2d 814 (2d Dep't 1954); Anderson v. Wood Dolson Co., supra; Norman v. Federal Mining & Smelting Co., supra; First National Bank v. Commercial Travellers' Home Association of America, 108 App. Div. 78, 95 N.Y.S. 454 (3d Dep't 1905), aff'd, 185 N.Y. 575, 78 N.E. 1103 (1906); Santos v. National Bank, 130 Misc. 348, 223 N.Y.S. 817 (Sup. Ct. Warren Co. 1927); Restatement (Second) of Agency § 94 1958.

Plessey did not receive the slightest hint that ISL considered any action taken as improper. Plaintiff offered no evidence to the contrary.

D. Plaintiff's Claim of Coercion was Legally Insufficient

Plaintiff argues that Judge Bonsal should have permitted the jury to determine whether the March 2 amendment was invalid on the ground that it was exacted

by economic duress. Plaintiff engages in an overly long discussion of facts which were not disputed by Plessey at trial but fails to come to grips with the question of whether those facts, as a matter of law, are of any help to plaintiff.

The authorities quoted by plaintiff make it clear that in order to avoid a transaction on the ground of economic duress there must be a showing that the complaining party was threatened with a breach of contract or some other improper injury if it did not accede to the demands of the other party (Br. 23-25). Plaintiff ignores the fact that because of ISL's misrepresentation and the breach of a condition precedent in the contract, Plessey was entitled to request amendments in consideration of Plessey's waiving its right to cancel the transaction. Bachorik v. Allied Control Co., 34 A.D.2d 940, 312 N.Y.S.2d 272 (1st Dep't 1970); Nixon v. Leitman, 32 Misc. 2d 461, 224 N.Y.S.2d 448, 452 (Sup. Ct. N.Y. Co. 1962).

Plaintiff claims that Plessey demanded the amendments on March 2 because it knew that ISL would have to accede because of its imminent insolvency and the threat by Data 100 to foreclose on the stock of ISL's principal shareholders (Br. 19-23). Plessey did not dispute any

of these facts but, indeed, admitted that all of these facts were known to Plessey prior to February 4, 1970 when it signed the original agreement. Plaintiff contends that Plessey held ISL in a "death-grip" on March 2, 1970, but no matter how you characterize the relationship of the parties, that relationship was no different on March 2 than it was on February 4, 1970. Thus, plaintiff's own proxy material, dated February 2, 1970, summarized ISL's position as follows (Ex. 9, p. 4, E. 88):

> "The Board has attempted to negotiate various transactions providing for the investment of additional funds in the Company or for a sale or merger of the Company. None of such attempts other than the contract with Plessey has met with any success, and the Board believes that the sale to Plessey is the only alternative to insolvency proceedings."

The undisputed evidence in the record demonstrates that Plessey, which was ISL's last hope by its own admission, did not seek to take any unfair advantage of ISL in negotiating the original agreement. The only reason for Plessey's requiring amendments at closing was ISL's misrepresentations concerning its financial condition and ISL's breach of the condition in the contract establishing the maximum loss which ISL could sustain between December 31 and the date of the closing.

As plaintiff's own proxy material discloses, by February 4, 1970 there was no other potential purchaser interested in acquiring the business. Kovar testified that before the contract was signed, he told Sinsheimer and Albert that he would not even be able to meet his payroll and operating expenses for the month of February unless he sold the villa (A. 239, 1684-85). Plessey did not seek to take any advantage of this situation but immediately advanced $84,000 for the villa so that ISL could continue its operations until the closing (A. 1684-85).

Shortly after the contract was signed, Kovar was faced with the resignation of his operating chief, Norstedt, which would have seriously hindered Kovar's ability to meet the profit levels required in the contract in order for him to retain management. Kovar admitted that he had no one to replace Norstedt. When Kovar disclosed this problem to Clarke and Crocker in mid-February, they immediately offered the services of Hewitt, Plessey's top production man in its Lisbon plant (A. 428-31, 1283-85). Plessey did not seek to extort any pound of flesh from ISL in exchange for helping Kovar avoid the sure catastrophe that would have resulted by Norstedt's leaving without a competent replacement.

Plaintiff made no claim at trial that Plessey sought to include any unfair or onerous terms in the original contract. On the contrary, Plessey's fairness throughout the transaction is evidenced by its accession to ISL's requests for terms when ISL was admittedly in no position to bargain. Thus, Sinsheimer, although he first refused, later agreed to permit an averaging concept in paragraph 5(d) of the agreement. In addition, Plessey had initially demanded that paragraph 10(e)(i) of the agreement limit ISL's losses between December 31 and the closing to a total of $10,000 because of Kovar's representations that the business had reached a turning point and was about to become profitable. It was Lewis and Kovar who proposed that paragraph 10(e)(i) permit losses up to $20,000 per month and Plessey agreed (A. 1405-08; Ex. 2, p. 12, E. 33).

Finally, the Data 100 loan itself is perhaps the best evidence of Plessey's good faith and fair dealing in this transaction. Plaintiff concedes that the Data 100 loan was originally due on January 31, 1970 and that this fact was disclosed to Plessey prior to February 4 (A. 349-52; Ex. CH, E. 346). ISL was able to obtain an extension of the payment date to March 6 solely because it advised Data 100 that it was about to sign an agreement with Plessey pursuant

to which Plessey would provide the funds to repay the bank loan which had been guaranteed by Data 100 (A. 353-54; Ex. G, SE. 373). Data 100 obviously was not interested in acquiring control of the business by foreclosing on the stock of ISL which had been pledged as collateral; otherwise Data 100 would have foreclosed on the loan on January 31 and refused an extension.

If Plessey had wished to take unfair advantage of ISL and to dictate extortionate terms for the purchase of the business, Plessey could merely have acquired Data 100's rights by paying off the bank loan and receiving an assignment of Data 100's rights in the collateral. Plessey could thus have acquired the controlling stock in the company for $200,000 and sat back until ISL was ready to accede to any terms Plessey wished to dictate.

Finally, Sinsheimer, Dubin and Albert testified unequivocally that there was no thought of seeking an amendment to the contract until the day of closing itself, and that Plessey's demand was based solely upon the information learned at the closing (A. 1147-49, 1410, 1687-88).

If the foregoing evidence by itself is not so overwhelming as to refute any suggestion of economic duress,

plaintiff's failure to raise this claim at any time prior to the commencement of litigation several months after the end of the measuring year is sufficient to constitute a waiver of the claim as a matter of law. It has consistently been held that a party seeking to void a transaction allegedly induced by duress must act promptly to repudiate the contract. A delay in asserting such a claim will waive any later allegations of economic duress. Leader v. Dinkler Management Corp., 26 A.D.2d 642, 272 N.Y.S.2d 397 (2d Dep't 1966), aff'd, 20 N.Y.2d 393, 283 N.Y.S.2d 281 (1967); Feyh v. Brandtjen & Kluge, Inc., 1 A.D.2d 1013, 151 N.Y.S. 2d 454 (2d Dep't 1956), aff'd, 3 N.Y.2d 971, 169 N.Y.S.2d 38 (1957); Port Chester Electrical Construction Corp. v. Hastings Terraces, 284 App. Div. 966, 134 N.Y.S.2d 656 (2d Dep't 1954); Faske v. Gershman, 30 Misc. 2d 442, 215 N.Y.S.2d 144 (Mun. Ct. N.Y. Co. 1961).

Assuming Kovar and Lewis felt that they had no choice but to accede on March 2, plaintiff offered no explanation for ISL's failure to repudiate the amendment promptly after that economic pressure had been removed. Plessey paid the $180,000 down payment at closing and within a week or two made the balance of the funds available to pay off ISL's creditors. There is therefore no explanation why

ISL did not put Plessey on notice that it considered the March 2 amendment improper. Indeed, as we have seen in the earlier discussion, plaintiff did not raise a claim of duress even in June 1970 when Plessey terminated Kovar and assumed management control. ISL's June 17 letter in response to Plessey's take-over made no claim that Plessey had improperly exacted the March 2 amendment, nor did Carlen or Shapiro make any such suggestion at their meeting with Sinsheimer on July 13 (pp. 36-39, supra).

In addition to the $800,000 Plessey was obligated to contribute to the business pursuant to the agreement (Ex. 5, E. 74), Plessey invested an additional $1,000,000 to try to turn ISL into a profitable operation during the measuring year (A. 1354-56, 1361; Ex. BE, pp. 3-5, E. 333-35). ISL cannot be permitted to now disavow the transaction after permitting Plessey to make such a substantial investment in reliance upon the validity of the agreement.

For the foregoing reasons, the judgment below should be affirmed because plaintiff has failed to raise any legal or factual issues sufficient to disturb Judge Bonsal's decision that the March 2 amendment was valid and binding in all respects.

E. Judge Bonsal's Decision Did Not Prejudice the Jury's Deliberations

Finally, plaintiff suggests that Judge Bonsal's determination that the amendment was valid as a matter of law was prejudicial to plaintiff because Judge Bonsal ". . . in effect told the jury that Plessey's witnesses were credible and that plaintiff's were not" (Br. 26). Plaintiff does not cite a single instance in which Judge Bonsal made any statement in the presence of the jury from which the jury could have inferred that Judge Bonsal had any views with respect to the credibility of any witnesses.

On the contrary, Judge Bonsal in his charge to the jury, carefully explained to the jury in time-honored terms the separate and distinct functions of the Court and the jury (A. 1904-05, 1908):

> "I think I told you at the outset a couple of weeks ago that in a sense you and I are partners in the administration of justice. It is my province to instruct you as to the law, which applies to the case, and you must accept my instructions as to the law, but, on the other hand, you, the jury, are the judges of the facts and it is your determination of the facts which is conclusive.

"If your recollection of the facts differs in any way from what the lawyers told you yesterday or what I might say to you this morning, disregard what we have said and rely on your own determination and recollection of the facts.

* * *

"Please draw no inference from anything that I may have said during the trial which might lead you to think that I favor one side or the other in this controversy because, of course, I do not. That is your province; that is not mine.

* * *

"How do you evaluate the testimony of all of these witnesses? The stories were conflicting in some respects. You, of course, are the exclusive judges of their credibility."

In the course of his charge Judge Bonsal devoted but one sentence to the validity of the amendment in which he merely recited in his review of the facts for the jury that the March 2 amendment was a "proper amendment" (A. 1912). Thus, there was no reason for the jury to think that Judge Bonsal had resolved the question of the validity of the amendment on any ground other than that he had reached this conclusion within the scope of his separate and distinct function to determine legal questions.

His instructions carefully negated that Judge Bonsal was making any factual resolutions or weighing the credibility of any witness.

Plaintiff has not cited a single instance during three weeks of trial where Judge Bonsal displayed by word or gesture any doubt as to the veracity of any of plaintiff's witnesses. Moreover, plaintiff never raised this question in the court below. Plaintiff failed to make any objection before the jury retired or to request that Judge Bonsal make any further statement in his charge to allay plaintiff's alleged concern that the jury may be prejudiced by the trial judge's determination of legal questions which could not properly be submitted to the jury.

II

THE JURY PROPERLY CONCLUDED THAT PLESSEY HAD THE RIGHT TO ASSUME MANAGEMENT CONTROL OF THE BUSINESS

Plaintiff further argues that, even if the March 2 amendment is valid, Plessey breached the agreement by assuming control one month early. The jury found otherwise in the special verdict which it returned (Judgment, p. 3, SE. 371). Plaintiff does not challenge the framing of the question to the jury but attacks the verdict as "contrary to the weight of the evidence." (Br. 27).

Once again plaintiff urges an improper standard for review. The appellate court does not "weigh evidence" but rather evaluates the evidence and all reasonable inferences therefrom in the light most favorable to the party who secured the verdict. Park v. Village of Waverly, 457 F.2d 1139 (2d Cir. 1972); Finale v. Anderson, 427 F.2d 172 (2d Cir. 1970), cert. denied, 401 U.S. 915 (1971); Casey v. American Export Lines, Inc., 173 F.2d 324, rev'd on other grounds, 176 F.2d 337 (2d Cir.), cert. denied, 338 U.S. 885 (1949); Jerry Vogel Music Co. v. Forster Music Publisher, 147 F.2d 614 (2d Cir.), cert. denied, 325 U.S. 880 (1945); 5 J. Moore Federal Practice ¶ 38.08 at 89-90 (2d ed. 1974).

The jury's verdict must be sustained if there is any substantial evidence on which the jury could have based its decision. Trade Development Bank v. Continental Insurance Co., 469 F.2d 35 (2d Cir. 1972); Park v. Village of Waverly, supra; Braen v. Pfeifer Oil Transportation Co., 263 F.2d 147 (2d Cir.), rev'd on other grounds, 361 U.S. 129 (1959); Orvis v. Higgins, 180 F.2d 537 (2d Cir.), cert. denied, 340 U.S. 810 (1950); Palum v. Lehigh Valley R.R., 165 F.2d 3 (2d Cir. 1948). The evidence amply sustained the verdict under this test.

On or about June 4, Sinsheimer learned that the profits for the month of May were less than $15,000. By Sinsheimer's letter dated June 9, 1970 to the ISL Board (Ex. 26, E. 152), Plessey exercised its right to assume management control pursuant to the contract as amended on March 2, which provides in relevant part (Ex. 5, E. 74):

> ". . . [I]f the profits of ISL commencing May 1, 1970 (crediting to the month of May the net profits of the 2-month period comprised of March and April, 1970, but not charging any net loss for that period) average less than $15,000 per month, or if there have been three consecutive months of losses during that measuring year (excluding the first two months thereof), this sub-paragraph shall no longer apply and Plessey shall have the right to assume full management responsibilities."

As discussed above, Plessey had originally resisted ISL's request that it remain in control of management throughout the measuring year. In the second draft (Ex. 2, E. 22), Plessey had offered a compromise that ISL could remain in control if it achieved a profit of $15,000 by the third month of the measuring year (June) and in each and every month of the measuring year thereafter (pp. 7-8, supra). The final February 4 agreement modified this proposal by introducing an averaging concept (Ex. 3, ¶ 5(d), E. 50-51; Ex. 4, E. 72) which was continued in the closing amendment (Ex. 5, E. 74). The testimony of Sinsheimer and Dubin on the one hand and that of Kovar, Carlen and Lewis on the other was irreconcilable concerning the intent underlying the language to which the parties had agreed. The jury chose to believe Sinsheimer and Dubin and their rejection of the testimony of ISL's witnesses is more than amply supported by the evidence in the record.

Neither Sinsheimer, Carlen nor Kovar were directly involved in drafting paragraph 5(d) which was done by Lewis and Dubin in a telephone conversation on February 2 or 3 (pp. 8-9, supra). The differing versions of Lewis and Dubin of that telephone conversation could not be reconciled other than by the jury's determination as to where the truth lay.

1. Dubin's Testimony

According to Dubin, Lewis called him after the ISL January 31 Board meeting and told him that the ISL Board was unwilling to accept Sinsheimer's proposal that ISL management be required to earn $15,000 in each and every month from June 1970 through March 1971, the end of the measuring year. Lewis argued that this was unfair because even in the best run business no management could insure uninterrupted monthly profits and that there might be months during the ten-month period in which ISL failed to achieve $15,000 profit. He argued that if ISL management achieved profits in the earlier months of the measuring year, it would be unfair to oust it from control because it slipped below $15,000 in some later month (A. 1398-1400).

Dubin acknowledged some merit in Lewis' argument and agreed, subject to Sinsheimer's approval, to an averaging provision that: (i) would still require ISL to achieve a $15,000 profit by the third month of the measuring year; namely, June; but, (ii) would thereafter allow ISL management to average profits of succeeding months with prior months to achieve a $15,000 profit (A. 1398-1400, 1422, 1435).

Sinsheimer testified that this was the basis upon which Dubin explained the provision to him and upon which he agreed (A. 1088-91, 1127-30, 1132-34, 1144-47, 1165-66, 1168). Thus, under Plessey's interpretation of the agreement (Ex. 4, E. 72), ISL would be required to achieve a $15,000 profit in the third month of the measuring year (June) or Plessey could assume control (A. 1130, 1399-1400).

2. Lewis' Testimony

Lewis disagreed with Dubin's testimony on the crucial issue of why the word "average" was inserted in paragraph 5(d). Lewis insisted that he had told Dubin and that Dubin had agreed that ISL would be given until at least the fourth month (July) to achieve average profits of $15,000 (A. 633-39, 653-56). Lewis claimed that he specifically stated to Dubin that the first two months of the measuring year (April and May) would not count and that ISL would be permitted the third and fourth months (June and July) to achieve the $15,000 average profit (A. 653-54). Dubin denied that there was ever such a suggestion by Lewis (A. 1399-1400).

All of the witnesses agreed that the March 2 modification was not intended to change the averaging concept in the original agreement. Under either party's

version, the amendment merely shortened the take-over period by 30 days.*

Plaintiff argues that the word "average" requires an arithmetical mean between at least two numbers; therefore, the reference to average monthly profits in the amendment had to confer a right upon ISL to achieve the $15,000 profit in at least two months (May and June) and did not permit Plessey to assume control at the end of May (Br. 28). This academic argument ignores the testimony in the record that the parties bargained for and agreed to a very specific use of the word "average." The jury accepted Plessey's testimony that the averaging concept was not to excuse ISL from the requirement that it achieve the $15,000 profit level by May but was inserted solely to permit

---

* The amendment also permitted ISL to add any profits which it might make in March and April to its results for May in calculating the profit for May, whereas under the original agreement the results of any month prior to June were not to be counted in the computation (A. 1421-22).

averaging by ISL in later months of the measuring year (A. 1398-1400, 1420-21).*

Under Plessey's interpretation of the provision, the original agreement afforded ISL three months of the measuring year to reach the $15,000 profit level (April, May and June). The March 2 amendment reduced that period to two months (April and May). Under ISL's interpretation, the original agreement afforded ISL four months to achieve the profit (April, May, June and July) which was reduced by

---

* Plaintiff suggests that Plessey's interpretation of paragraph 5(d) renders meaningless the language concerning three consecutive months of loss following the word "or" in the third sentence (Br. 35). Plaintiff offered no testimony in support of such a claim at trial. Moreover, the language is meaningful under Plessey's interpretation as illustrated by the following example. Excluding the first two months of the measuring year (April and May), assume ISL earned profits in June, July and August aggregating $100,000 and then had three consecutive months of loss in September, October and November aggregating $8,000. ISL would then have had aggregate profits of $92,000 for six months or more than $15,000 per month but Plessey still would have been entitled to assume management control because it had suffered three consecutive months of loss. The language concerning three consecutive months of loss was an alternative provision to allow Plessey to take over and is not to be read as a limitation on the averaging provision appearing before the "or." If this were not so, the language following the "or" would also have been shortened on March 2 to reduce the three consecutive months to two. This was not done (Compare Ex. 4, E. 72 and Ex. 5, E. 74).

the amendment to three months (April, May and June). The jury rejected the interpretation advanced by ISL's witnesses. It had good reason to do so, for the trial testimony of ISL's witnesses was contradicted by their prior oral and written statements including, in some cases, prior deposition testimony.

Lewis' trial testimony was flatly contradicted by a sworn affidavit, dated December 14, 1971, which he had submitted on a procedural motion.* Describing his long distance telephone conversation with Dubin on February 2 or 3, Lewis stated that paragraph 5(d) was modified in the final agreement to include (Ex. CM, p. 2, E. 353):

> ". . . (3) provision for a three months' averaging to determine whether $15,000 per month profit was earned (under paragraph 5) ..." (Emphasis added)

This statement is consistent with Plessey's interpretation of the original agreement - a three-month period which was shortened by the March 2 amendment to two months (p. 57, supra). Lewis was unable to reconcile his

---

* Prior to the commencement of this action in the Southern District on September 21, 1972, plaintiff had commenced an action on September 24, 1971 in the Northern District of Illinois. On August 24, 1972, the first action was dismissed for lack of jurisdiction over Plessey.

affidavit with his trial testimony that the original agreement provided four months which was reduced to three months by the March 2 amendment (A. 719-23). Finally, he suggested that, when he composed the December 1971 affidavit, he really thought that ISL had five months to achieve the required profits, consisting of the first two months which did not count, and then three months in which to achieve the average of $15,000 (A. 723-25). Lewis was then forced to admit that, under that interpretation of the original agreement (Ex. 4, E. 72), ISL would not have been required to achieve the $15,000 profit level until August (A. 725). ISL's position at trial was that the original agreement gave it until July. Lewis could not reconcile this with his tortured interpretation of his December 1971 affidavit (A. 725).

At trial, Carlen claimed that the original agreement afforded ISL four months, which was reduced to three months by the amendment (A. 619-20). At his deposition in Chicago, in July 1973, however, Carlen had unequivocally testified to an understanding of the agreement and amendment which were in accord with Plessey's interpretation; namely, that under the original agreement Plessey was required to achieve $15,000 profit in the third month (June), and under the amendment in the second month (May)

(A. 576-77, 585-89). Thus, Carlen testified at his deposition with respect to the February 4 agreement (A. 587):

> "Q What was the amount of the profit that the company would have to show in June in order to retain control?
>
> "A $15,000."

Carlen sought to reconcile his deposition and trial testimony but the trial judge pointed out that it was wholly inconsistent and asked Carlen which was correct (A. 588). Carlen responded that he had not understood the context in which the questions were asked at the deposition (A. 588-89). After being reminded that he had been questioned for ten pages with specific reference to the management control provision in the February agreement, and after being afforded a recess to examine the ten pages of deposition testimony, Carlen was unable to offer any other explanation for the inconsistency between his deposition and trial testimony (A. 590-91).

Similarly, at trial, Carlen claimed that he believed Plessey's assumption of control under the March 2 amendment was one month early. In his deposition, however, Carlen had conceded that, under the amendment,

Plessey had the right to assume control at the end of May (A. 613). By this point in his trial testimony, Carlen apparently realized the futility of suggesting to the jury that he had also misunderstood these questions at his deposition. Confronted for the second time with a crucial inconsistency between his trial and deposition testimony, Carlen sought to explain this contradiction on the ground that no one had suggested to him that Plessey's control under the amendment was premature until sometime in the first week of August 1970 (A. 614-16).* This desperate maneuver contradicted Carlen's earlier trial testimony that the prematurity of the take-over had been discussed thoroughly at the meetings in early June 1970 prior to his written response to Sinsheimer on June 17 (pp. 35-38, supra). More importantly, whether his lawyers had explained the alleged prematurity in June or August 1970, Carlen had no explanation for his deposition admission in July 1973 that the amendment permitted Plessey to take over management in May (A. 613).

Moreover, Carlen's arithmetic at trial, like Lewis', was not consistent with his contemporaneous written

---

* Lewis flatly contradicted Carlen's testimony; he was certain that he had thoroughly explained this matter to Carlen prior to June 17 (A. 711-12). Lewis, however, offered no explanation of why neither he nor Carlen included any claim that the take-over was premature in Carlen's written response to Sinsheimer (Ex. 27, E. 154).

expression of his understanding of the amendment. In a letter, dated August 11, 1970, from Carlen to the ISL shareholders (Ex. AT, E. 317), which Carlen had also discussed in draft form with Lewis, Shapiro and his own personal attorney (A. 623-24; Ex. CL, E. 351), Carlen stated that the amendment had shortened the management control provision from three months to two months (A. 619-27; Ex. AT, E. 317). Carlen could not explain his shifting and conflicting versions of the agreement (A. 625-27).

Turning to Kovar, he signed a severance agreement with Plessey dated June 16, 1970 which contained the following recital (Ex. AL, pp. 1-2, E. 310-11):

> "WHEREAS, said agreement further provided that in the event that the profits commencing May 1, 1970 averaged less than Fifteen Thousand ($15,000) Dollars per month the right of the prior management of ISL to have such maximum freedom to operate the business could be terminated by PLESSEY; and
>
> * * *
>
> "WHEREAS, the business did not average Fifteen Thousand ($15,000) Dollars profit for the month of May, 1970."

These recitals are, of course, consistent with Plessey's interpretation and wholly inconsistent with Kovar's trial testimony that he should have been permitted

until the end of June to achieve the required profits. Kovar offered no explanation at trial for the foregoing recitals in his severance agreement.

There were no such inconsistencies in the testimony of Dubin and Sinsheimer to trouble the jury. Their trial testimony was consistent and candid and there were no prior inconsistencies on their part. The jury, therefore, properly concluded that Plessey's witnesses were truthful and had an accurate recollection of the events while ISL's witnesses were forced to torture and twist their own prior statements to concoct the position asserted at trial.

III

PLESSEY CONTINUED THE BUSINESS OF ISL IN GOOD FAITH DURING THE MEASURING YEAR

In the event Plessey assumed management, paragraph 5(d) of the agreement obligated it "to continue the business of ISL during the measuring year in good faith" (Ex. 3, p. 6, E. 51).*

The New York courts have construed "good faith" to mean that neither party will do anything which will have the effect of destroying or injuring the rights of the other party to receive the benefits of the contract. Thus, the law imposes an obligation to use reasonable efforts to bring profits and revenues into existence. Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917); Simon v. Etgen, 213 N.Y. 589, 107 N.E. 1066 (1915); Van Valkenburgh Nooger & Neville, Inc. v. Hayden

---

* Up until the date of trial plaintiff maintained the position set forth in Carlen's June 17 letter (Ex. 27, E. 154) that the good faith provision constituted Plessey a trustee with an obligation to maximize profits on behalf of ISL. Plaintiff has abandoned that position on appeal.

Publishing Co., 33 A.D.2d 766, 306 N.Y.S.2d 599 (1st Dep't 1969), aff'd, 30 N.Y.2d 34, 330 N.Y.S.2d 329, cert. denied, 409 U.S. 875 (1972); Pernet v. Peabody Engineering Corp., 20 A.D.2d 781, 248 N.Y.S.2d 132 (1st Dep't 1964).

At trial, plaintiff contended that Plessey had breached this good faith obligation, and probed into every aspect of Plessey's management during the measuring year. Plaintiff pressed more than ten specific complaints of alleged bad faith by Plessey (Complaint, pp. 4-6, A. 10-12; Doc. 54, Pre-Trial Order, pp. 2-3; A. 140-44). Plessey's witnesses rebutted each of these unsupported allegations by plaintiff. On appeal, plaintiff relies upon but one of its many complaints, namely, the termination of cable harness assembly work (Br. 36-38).

Upon assuming management control, Plessey decided that the cable harness assembly program was in disarray and that there was no hope of doing this type of work profitably. Plessey's decision was to complete the single Honeywell order presently on the books but not to accept any new cable harness

work (A. 1230-35). The evidence in the record fully supports the jury's verdict that not only was this decision made in good faith but that it was correct.

In 1969 ISL had been able to obtain only one contract for cable harness work from a company named Dura. William Tucker, the chief United States marketing representative for ISL, could not recall the amount of the order but admitted that Dura had cancelled the contract before it was completed and that there was no reorder in 1970 (A. 1006-07).

In 1970 ISL had hoped to obtain a contract in the amount of $90,000 for cable harness assembly from IBM but IBM cancelled the contract before the Plessey takeover (A. 1008; Ex. CI, p. 2, E. 348).

The only contract which ISL had for cable harness work as of the date of the Plessey takeover was a "pilot" order from a Honeywell plant located in Lawrence, Massachusetts. Although Tucker claimed at trial that the pilot order had originally been for a total of $100,000, his written sales projection dated May 24, 1970 indicated that the order was only for $50,000 (Ex. CJ, p. 2, Col. 9, E. 350).

Tucker further admitted that the sales representatives had been unsuccessful in seeking cable harness assembly work from any customer other than Honeywell (A. 910-12).

Plaintiff's position at trial was simply that but for Plessey's decision, Honeywell would have given ISL additional orders upon satisfactory completion of the pilot order (A. 999; Ex. CJ, p. 2, Col. 9, E. 350). Tucker, however, made no claim that he had any personal knowledge on which to base this assumption. The only evidence which plaintiff introduced was a letter dated July 15, 1970 from Vince Huntoon, the regional sales representative for ISL in the New England area, to Gretton (Ex. 58, E. 179). Huntoon wrote that since the Plessey take-over there had been a marked improvement in ISL's performance on the Honeywell cable harness contract and he was, therefore, hopeful that at some unspecified time in the future ISL could hope to obtain a substantial order from Honeywell. He cited no facts or figures nor did he indicate in his letter that Honeywell had discussed any specific contract of any specific amount (Ex. 58, E. 179).

Plessey, on the other hand, introduced two memoranda from Huntoon which depicted in graphic detail the poor performance of ISL on the pilot order and, as a result, serious dissatisfaction at Honeywell (A. 1008-12; Ex. DJ, E. 357 and Ex. DL, E. 358).

In addition, Tucker admitted that: (i) despite a year's marketing efforts ISL had been unable to obtain any contract from Honeywell except the small pilot order (A. 899-900); (ii) ISL did not have the present capacity to handle a substantial order and would be required to train additional employees and build up plant capacity (A. 1000); and (iii) his own sales projection prepared on May 24, 1970 at Kovar's request projected a second order of only $100,000 which would have been obtained at the earliest in September 1970 (A. 995-97; Ex. CJ, p. 2, Cols. 3-6, E. 350).

Plessey's witnesses testified that the decision to terminate cable harness work was motivated by their desire to make the business more profitable. Sinsheimer and Clarke testified that they understood cable harness to be a very unprofitable

business (A. 1107-08, 1181, 1234). Gretton testified that the pilot order from Honeywell did not permit the production employees to work at efficient speed (A. 1533-34), that ISL lacked necessary testing equipment for this kind of work (A. 1594) and that the existing plant capacity was only $8,000 per month (A. 1594-95; Ex. 25, E. 150). Even Hewitt, whom plaintiff called as a witness, testified that he recommended to Plessey that it concentrate on assembling core memory stacks in the Barbados facility and that cable harness be performed somewhere else (A. 1752).

Moreover, Gretton testified that to his knowledge there was no additional cable harness work available from Honeywell or other companies (A. 1535). This was confirmed when Honeywell subsequently cancelled the balance of the pilot order because of its reduced requirements for the product (A. 1540-42; Ex. 35, p. 2, E. 165).

Based upon the foregoing evidence, the jury was clearly warranted in finding that Plessey's decision to terminate cable harness work was made in good faith. The jury properly disregarded Tucker's

speculative testimony in view of Plessey's uncontroverted evidence that the work could not be done profitably or efficiently at the Barbados plant.

IV

PLAINTIFF OFFERED NO EVIDENCE TO SUPPORT ITS CLAIM THAT PLESSEY DEFRAUDED ISL

Plaintiff contends that Plessey defrauded ISL because Plessey " . . .never intended to permit ISL to manage the business during the measuring year" (Br. 39). Plaintiff's claim was doomed to fail once the jury had determined that Plessey's assumption of management control was not a breach of paragraph 5(d) of the agreement. After it had been found that Plessey's assumption of control was in accordance with the contract provision, it became irrelevant whether Plessey harbored some private intention, never carried out, contrary to its contractual obligation. VTR, Inc. v. Goodyear Tire & Rubber Co., 303 F.Supp. 773, 779 (S.D.N.Y. 1969); Brick v. Cohn-Hall-Marx Co., 276 N.Y. 259, 264, 11 N.E.2d 902, 904 (1937); Drydock Knitting Mills, Inc. v. Queens Machine Corp., 254 App.Div. 568, 2 N.Y.S.2d 717 (2d Dep't 1938).

Plaintiff discusses various actions by Plessey during the measuring year as examples of the alleged fraud. In no instance does plaintiff explain how any of those actions constituted a breach of any promise or contractual representation by Plessey.

Plaintiff suggests that Plessey intended to implement its "Matrix U.S.A. plan" (Ex. 71, E. 183) even if that plan called for actions not permitted under the agreement (Br. 39-41). Sinsheimer readily conceded that the acquisition of ISL was intended to meet the goals outlined in the plan. This plan, prepared by a low level Plessey employee, had been drafted before ISL had even come to Plessey's attention (A. 1082, 1084). Sinsheimer made all final decisions relating to ISL during the measuring year. No one was permitted to implement any of the proposals in that general plan before clearing them with Sinsheimer to determine that there would be no violation of Plessey's contractual obligations to ISL during the measuring year (A. 1062, 1087-88, 1232; Ex. 20, E. 146).

Plaintiff also points to a report by Crocker (Ex. 11, E. 98) as containing proposals allegedly in conflict with the provisions of the contract (Br. 41-42). Crocker, the group director in charge of Plessey's European memory business, had no authority over the ISL facility prior to June 9. There was no evidence at trial that any proposal by Crocker was ever implemented in violation of any contractual provision.

Plaintiff cites as evidence of Plessey's fraud: (a) the employment of Parr as a marketing manager based in the United States (Br. 42); and (b) the opening of an office in the Boston area to provide additional marketing, engineering and test and repair services to ISL's customers (Br. 41).

The simple answer to these two items is that Kovar himself had proposed such steps in a letter to Sinsheimer on February 6, two days after the contract was signed (Ex. Z, SE. 376). Thus, Kovar wrote that the existing network of independent sales representatives could be strengthened by the addition of a marketing director based in the United States (Ex. Z, p. 1, SE. 376). Parr, who had experience in marketing computer memory products, was introduced to Kovar in early May before he was hired. Kovar did not object to the retention of Parr and admitted that Parr did not interfere in any way with his authority prior to the Plessey takeover on June 9 (A. 266-69, 481-82, 511-12, 860-61).

Kovar's letter also suggested an office in Miami, Florida, which would employ additional engineers to work with the sales representatives and which would be responsible for testing and repairing ISL products

(A. 479-83; Ex. Z, pp. 1-2, SE. 376-77). Plessey had no contractual obligation to create such an office but agreed to open a Boston office near several substantial customers (A. 482, 862). Plaintiff offered no evidence that the opening of this additional facility caused any loss of business during the measuring year.

Plessey operated the Boston facility for the last six months of the measuring year at a cost of approximately $222,000. The funding of this office was provided by Plessey, over and above the $800,000 which Plessey was obligated by the contract to invest in the business. The expense of the Boston facility was not included in the computation of the $640,000 measuring year loss (A. 1144, 1354-55, 1364; Ex. BE, p. 6, E. 336).

Plaintiff also went so far as to suggest that the transfer of Hewitt to Barbados in early March 1970 to head up production at the Barbados plant was pursuant to a fraudulent scheme by Plessey. On the contrary, ISL's production head, John Norstedt, had announced his resignation in mid-February and Kovar had no one to replace him. Thus, Kovar would have been left without an operating head at the critical time when it was necessary for him to increase

productivity in order to attain the profits required to retain the management of the company. When Kovar explained this problem to Clarke and Crocker, they immediately offered to make Hewitt, the top production man in Plessey's Lisbon plant, available to assist Kovar in this crisis (A. 1283-87). Kovar conceded that Hewitt served him as a loyal and competent employee.

Finally, plaintiff cites several memoranda prepared by Clarke relating to contingency plans for the assumption of management control by Plessey (Br. 43-44). Sinsheimer testified that by May he had determined to assume control as soon as the contract permitted (A. 1087-88). Kovar's ability as a businessman was questioned because of the financial misrepresentations which had resulted in the amendments at the closing (pp. 12-15, supra); the business had continued to sustain substantial losses in March and April (Ex. 16, E. 138 and Ex. 19, E. 143); by mid-May it was apparent that Kovar would be unable to obtain the $15,000 profit in that month as required by the contract (A. 1091); Kovar had refused to implement changes which Clarke and Crocker had suggested in early May, which changes Plessey believed would improve the productivity of the ISL plant (A. 1084-87). For all of these reasons,

Sinsheimer instructed Clarke, as the person responsible for the administration of the ISL operation, to be prepared to assume control in early June (A. 1087-88, 1091-99). When ISL failed to achieve the $15,000 profit in May, Plessey assumed control. As discussed in Point II of this brief, the jury determined that the takeover was authorized by paragraph 5(d) of the contract and it, therefore, concluded that there was neither a breach of the contract nor fraud by Plessey. The evidence clearly supported this verdict.

V

THE JURY'S VERDICT ON PLESSEY'S COUNTERCLAIM SHOULD BE REVERSED AND JUDGMENT ENTERED FOR PLESSEY

Plessey asserted a counterclaim seeking damages on the ground that ISL had breached certain financial representations and warranties in the agreement of February 4. The jury held that Plessey had relied upon the representations and warranties contained in subparagraphs 10(d) and (g) of the agreement (Ex. 3, E. 46) but that there was no breach by ISL (Judgment, p. 4, SE. 372). On the contrary, the breach was established by documentary evidence and judgment should be entered for Plessey.

A. ISL Misrepresented Its Liabilities

In subparagraph 10(d) of the agreement, ISL represented and warranted that ISL had no liabilities or obligations except to the extent reflected or reserved against in ISL's balance sheet as of December 31, 1969 (Ex. 3, pp. 9, 11-12; E. 56, 58-59; Ex. AZ, E. 318). Plessey introduced uncontroverted documentary evidence that ISL's December 31, 1969 balance sheet (Ex. AZ, E. 318), delivered at closing, understated ISL's liabilities by $33,822. This balance sheet delivered by Hourihan showed accounts payable of $403,109 (Ex. AZ, p. 3, E. 320). Following its assumption

of control, Plessey caused an audit of ISL's 1969 accounts to be performed by Price Waterhouse & Co. Keith P. Jones, a Price Waterhouse partner, testified that his audit disclosed that the accounts payable were in fact $436,931 (A. 1350; Ex. BC, p. 3, E. 325 and Ex. BG, pp. 2, 4, E. 339, 341).*

Plaintiff offered no rebuttal of Jones' testimony on this point. Therefore, since the jury found that Plessey had relied upon the representation, there is no basis upon which the jury could have properly failed to award Plessey damages in the amount of $33,822, and it is entitled to judgment in this amount as a matter of law.

B. ISL Overvalued Its Inventory

Paragraph 10(g) of the February 4 agreement provides as follows (Ex. 3, pp. 9, 13-14, E. 56, 60-61):

> "g. The inventories of ISL shown on its balance sheet of December 31, 1969 or thereafter acquired by ISL prior to the date of this Agreement, consist of items of a quality and quantity useable in the normal course of ISL's business; the value of obsolete materials or of materials below standard quality has been written down to realizable market value

---

* Ex. BG is a comparison of the Price Waterhouse & Co. audited 1969 statement (Ex. BC) and the unaudited statement delivered by Hourihan at closing (Ex. AZ) with various schedules explaining the differences in the two statements (A. 1344-45).

> and the values at which such inventories are carried reflect ISL's normal inventory valuation policy of stating the inventory at cost, not in excess of market, all in accordance with generally accepted accounting principles."

Hourihan's December 31, 1969 balance sheet listed inventory "at cost but not above realizable value" of $233,031 (Ex. AZ, p. 3, E. 320). The Price Waterhouse & Co. audit found inventory of only $150,101. Thus, ISL's warranted statement overvalued inventory by $72,930 (A. 1348-50; Ex. BG, pp. 2-3, E. 339-40).

Plaintiff made a weak effort to rebut this item. Included in the $72,930 difference was the sum of $58,500 attributable to memory cores which were in fact nonexistent. The Hourihan statement had reported that there were 13,000,000 memory cores valued at $65,000 in inventory (Ex. AZ, p. 4, notes 3 and 4, E. 321) while the subsequent audit determined that there were in fact only 1,300,000 memory cores in stock valued at $6,500. Plaintiff contended: (a) that this was a good faith mistake on Hourihan's part and (b) that the footnotes to Hourihan's statement put Plessey on notice that ISL had no immediate need for the cores and that a market price was unobtainable as of the date of the statement (Ex. AZ, p. 4, notes 3 and 4(b)(1), E. 321).

Plaintiff's first argument is legally insuffcient. The contract contained an unqualified representation that the balance sheet delivered at closing would be accurate. Any mistake in that statement, whether made in good faith or otherwise, represented a breach of the representation in the contract entitling Plessey to damages in the amount of any such inaccuracy.

The only witness who offered any testimony concerning the memory cores was Albert, Plessey's comptroller. His uncontroverted testimony was that Plessey had planned to use those memory cores in its European operations and that Hourihan did not disclose to him until some time in April or May that 11,700,000 of the cores were nonexistent (A. 1700). Thus, whether or not the cores were useable in ISL's manufacturing operations, Plessey had relied on the representation that the cores were part of the assets which could be used in its other plants (A. 1700, 1737).

As to Plessey's counterclaim, the jury's verdict should be set aside and judgment should be entered in favor of Plessey in the amount of $106,752.

VI

PLESSEY WAS ENTITLED TO COSTS AS THE PREVAILING PARTY AND IN THE TAXING OF THESE COSTS SHOULD NOT HAVE BEEN BOUND BY THE "100-MILE WITNESS RULE"

After judgment was entered Plessey, as prevailing party, sought taxation of costs from the Clerk of the District Court. The Clerk awarded costs for witness fees and depositions, but limited travel allowances for witnesses to 100 miles beyond the territorial jurisdiction of the Court. Both sides moved for a review of the Clerk's action, which Judge Bonsal affirmed in all respects.

Plaintiff appeals on the ground that Plessey was not a prevailing party because the jury rejected its counterclaim. Plessey cross-appeals from the 100 mile limit on witness fees.*

A. Plessey Was the Prevailing Party

Plaintiff's authority in support of its argument that Plessey cannot be deemed the "prevailing party" for purposes of Rule 54(d) of the Federal Rules of Civil Procedure, provides nothing more than the obvious and well

---

* Plessey does not appeal from the judgment that Plessey was not entitled to the cost of the trial transcript because the prevailing party in this Court will have the opportunity to claim this item as a cost of the appeal.

settled approach to this issue, that the "prevailing party" depends upon the facts and circumstances of the particular case. It is not the law that a defendant who successfully defends an action brought against it cannot receive an award of costs merely because the defendant is unsuccessful in sustaining a counterclaim interposed in response to plaintiff's suit. Berg v. Wall Street Traders, Inc., 46 F.R.D. 47 (S.D.N.Y. 1968); Bowman v. West Disinfecting Co., 25 F.R.D. 280 (E.D.N.Y. 1960); Ryan v. Arabian American Oil Co., 18 F.R.D. 206 (S.D.N.Y. 1955); B.B. Chemical Co. v. Cataract Chemical Co., 2 F.R.D. 159 (W.D.N.Y.), modified on other grounds, 122 F.2d 526 (2d Cir. 1941). See also 6 J. Moore, Federal Practice § 54.70, at 1305-06 (2 ed. 1974).

The facts of this case do not lend themselves to the conclusion that there was a stand-off. In terms of amount of testimony and time consumed, the overwhelming focus of the action was on the plaintiff's claims and on these Plessey completely prevailed.

Plaintiff's claims for actual damages of $1,260,000, as well as exemplary damages, required a three-week trial involving sixteen witnesses, over 1800 pages of testimony and more than 100 exhibits. At trial, Plessey limited its counterclaim to a request for damages in the

amount of $106,752 because ISL had breached subparagraphs 10(d) and (g) of the agreement (Point V, p. 77, supra). Plessey introduced but two exhibits (Ex. BC and BG) and elicited approximately fifteen minutes of testimony from Albert, Plessey's former comptroller, and Jones, the Price Waterhouse partner, concerning these issues. Both Albert and Jones were also necessary witnesses in the defense of plaintiff's claims. Under these circumstances, Judge Bonsal was clearly warranted, under the authorities cited, to find that Plessey was the prevailing party.

B. The "100-Mile Rule" Does Not Apply in This Circuit

Plessey's appeal on the question of witness fees is based on the modern trend to destroy the archaic 100-mile restriction in the taxation of witness fees. This case presents an excellent opportunity for this Court to clarify a simple situation which has caused considerable uncertainty in this circuit. Clearly Plessey was forced to go to great expense to bring witnesses from far flung locations to defend itself. The 100-mile restriction is clearly burdensome and unrealistic in a case such as this. Plessey requests that this Court sustain the approach that has been taken by many judges in this Circuit. Cases where the 100-mile rule has been disregarded include Electronic

Specialty Co. v. International Controls Corp., 47 F.R.D. 158 (S.D.N.Y.), modified on other grounds, 409 F.2d 937 (2d Cir. 1969); Oscar Gruss & Son v. Lumbermens Mutual Casualty Co., 46 F.R.D. 635 (S.D.N.Y. 1969); Dunn v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 279 F. Supp. 937 (S.D.N.Y. 1968); Bank of America v. Loew's International Corp., 163 F. Supp. 924 (S.D.N.Y. 1958); Maresco v. Flota Mercante Grancolombiana, S.A., 167 F. Supp. 845 (E.D.N.Y. 1958).

Plessey was required to bring several witnesses from distances greatly exceeding 100 miles. Gretton, Plessey's plant manager in Barbados from July 1970 through the end of the measuring year, and Ballantyne, an ISL engineer hired originally by Kovar and retained by Plessey through the measuring year, are residents of California. They were essential to rebut plaintiff's claim that Plessey did not act in good faith. They also gave extensive testimony on the issue of production orders allegedly lost by Plessey during the measuring year (Transcript pp. 1322-84, 1416-34, 1441-1525, 1527-51).

Jones, the Price Waterhouse partner, is a resident of Barbados. His testimony was essential to establish that measuring year loss of $640,000 had been computed in

accordance with the contract formula (A. 1338-90). Indeed plaintiff's counsel objected when Plessey sought to introduce the relevant financial statements through Sinsheimer because "we have not had the Price Waterhouse man here" (A. 1142-43).

Finally, Plessey was required to call Osborn, a purchasing agent, and Vangelakos, an engineer, from Magnavox. Plaintiff charged that, through incompetence, Plessey had lost a Magnavox order in excess of $600,000. This represented almost 25% of the approximate $2.5 million in sales on which Kovar had projected a $360,000 profit for the measuring year (Ex. 13, E. 117). It was, therefore, crucial that Plessey rebut the charge through independent and unbiased witnesses. Both Osborn and Vangelakos, who are residents of Indiana, were a necessary part of this rebuttal (Transcript pp. 1385-1416).

Since each of these witnesses possessed relevant and material information and were necessary to enable Plessey to present an effective defense, Plessey submits that the judgment below limiting travel expenses to 100 miles should be reversed.

CONCLUSION

For the foregoing reasons, Plessey respectfully requests that Judge Bonsal's decision with respect to the validity of the amendment and the jury verdict with respect to plaintiff's claims be affirmed in all respects, that the jury's verdict be set aside and judgment entered for Plessey on its counterclaim and that Plessey's right to costs be affirmed and that Judge Bonsal's determination limiting witnesses' travel expenses to 100 miles be reversed.

Dated: New York, New York
October 4, 1974

Respectfully submitted,

ROGERS & WELLS
Attorneys for Defendant-
Appellee Plessey Incorporated
200 Park Avenue
New York, New York 10017
972-7000 (212)

Of Counsel:

William F. Koegel
James J. Maloney
John B. Koegel

COPY RECEIVED (2)
Date: 10/4/74
Time: 1:30 PM
Silberfeld, Danziger & Bangser
Attorneys for ~~Pltf-Appe~~
By: [signature]